

UNITED STATES COURT OF THE UNITED STATES

COMMENCED WITH [REDACTED]

24 [REDACTED] 1935

AMERICAN SURETY COMPANY, PLAINTIFF IN ERROR

vs. JOHN DAVID COMPANY, EDNA B. BAINSTON,
JAMES B. BAINSTON, AND JESSE B. BLACKMER, JR.
et al.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

ENTERED FOR RECORD & INDEX

[REDACTED]

(24.902)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 619.

ILLINOIS SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE JOHN DAVIS COMPANY, EMMA E. BAIRSTOW,
GEORGE H. BAIRSTOW, AND JESSIE B. BLACKMER, EX-
ECUTORS, &c., ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1913.

No. 2092-3

THE UNITED STATES OF AMERICA FOR THE USE OF THE
JOHN DAVIS CO. ET AL.,
Plaintiffs in Error,

vs.

ILLINOIS SURETY COMPANY AND W. H. SCHOTT,
Defendants in Error.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA FOR THE USE OF THE
JOHN DAVIS CO. ET AL.,
Defendants in Error.

MR. WM. D. MCKENZIE,
MR. RALPH E. CHURCH,
MR. NEWTON WYETH,
MR. J. WORTH ALLEN,
MR. F. HAROLD SCHMITT,
MR. WILLARD C. McNITT,
MR. EDWIN C. CRAWFORD,

*Counsel for The United States of
America, etc.*

MR. ALBERT J. HOPKINS,
MR. DAVID J. PEFFERS,
MR. DWIGHT S. BOBB,
MR. JAMES T. JARRELL,
MR. OSWELL L. McNEIL,

*Counsel for Illinois Surety Com-
pany et al.*

Error to the District Court of the United States for the Northern District
of Illinois, Eastern Division.



1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division before the Hon. A. L. Sanborn, United States District Judge for the Western District of Wisconsin, sitting by designation in the United States District Court for said Northern District of Illinois, on Friday, the Sixth day of February, being one of the days of the February Term of said Court, begun Monday, the second day thereof in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the United States of America, the one hundred and thirty-eighth year. Placita.

Present:

Hon. Arthur L. Sanborn, District Judge, Presiding,
Luman T. Hoy, United States Marshal for said District
and
T. C. MacMillan, Clerk of said Court.

2 IN THE CIRCUIT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

United States of America, for the use and benefit of James B. Clow & Sons, a Corporation, <i>et al.</i> <i>vs.</i> Illinois Surety Company, a Corpora- tion, and W. H. Schott.	}	30486.
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Be It Remembered, That heretofore to-wit: on the twenty-second day of September, 1911, come the Plaintiff in the above entitled cause by its attorney, and filed in the Clerk's office of said Court, its certain Declaration in words and figures following to-wit:

DECLARATION.

IN THE CIRCUIT COURT OF THE UNITED STATES,
 Northern District of Illinois,
 Eastern Division.
 October Term, A. D. 1911.

United States of America, for the use
 and benefit of James B. Clow &
 Sons, a Corporation, *et al.*

Plaintiff,

—vs—

Illinois Surety Company, a Corpora-
 tion, and W. H. Schott,

Defendants.

No. 30486. In Debt.
 Damages \$31,047.18

United States of America, plaintiff in this suit, which sues
 in this behalf for the use and benefit of James B. Clow &
 Sons, a corporation, Standard Underground Cable Company,
 a corporation, George Racky, doing business as Racky & Son
 Iron Works, D. E. Garrison, Jr., doing business as Garrison &
 Company, and Corrugated Bar Company, a corporation,
 United States Equipment Company, a corporation, James P.
 Marsh & Company, a corporation, Raymond Lead Company, a
 corporation, Scott Valve Company, a corporation, George B.
 Carpenter Company, a corporation, The Roebling Con-
 struction Company, a corporation, The Western Kiely
 Steam Specialty Company, a corporation, H. W. Johns-
 Manville Company, a corporation, Davies Supply Com-
 pany, a corporation, Racine Stone Company, a cor-
 poration, Stebbins Hardware Company, a corporation,
 Commonwealth Edison Company, a corporation, H.
 Channon Company, a corporation, Moloney Electric Company,
 a corporation, Nancy W. Watrous, doing business as G. B.
 Watrous Sons, The John Davis Company, a corporation,
 Universal Portland Cement Company, a corporation, F. Bair-
 stow, Featherstone Foundry & Machine Company, a corpora-
 tion, Electric Appliance Company, a corporation, West-
 ern Roofing & Supply Company, a corporation, and for the

Declaration
filed Sep
22, 1911.

use and benefit of all other persons, parties, and corporations, similarly situated in the premises, by Wyeth & Smith, Knapp & Campbell and Ralph E. Church, Isaac M. Jordan, Holt, Wheeler and Sidley, W. B. Moulton and John D. Clancy, its attorneys, complains of Illinios Surety Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, and W. H. Schott, defendants, of a plea that they render to the plaintiff for the use and benefit of the aforesaid, the sum of Thirty-one Thousand Forty-seven Dollars and eighteen cents (\$31,047.18) lawful money of the United States, which they, the said defendants, owe to and unjustly detain from the plaintiff for the use and benefit of the aforesaid.

For That Whereas, the said defendant, W. H. Schott, heretofore, to-wit: on the 30th day of July, 1908, entered into a formal contract with the plaintiff, to-wit: United States, for the construction, providing and installing at the United States Naval Training Station, Great Lakes, North Chicago, Illinois, heating and electrical distribution mains and concrete tunnel, and the furnishing of all the necessary materials, labor, tools, and appliances therefor, all in conformity with the plans and specifications for said work with any modifications thereof, as provided in said contract, and the plans and specifications and addenda thereto; and plaintiff further avers that upon the making of said contract and in pursuance of the Act of Congress in force February 24th, 1905, entitled "An Act to amend an Act approved August 13th, 1904, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,'" the said defendants, W. H. Schott, as principal, and Illinois Surety Company, as surety, on to-wit: the third day of August, 1908, by their certain writing obligatory, signed and sealed with the seal of said defendants, bearing said date of to-wit: the 3rd day of August, 5 1908, jointly and severally acknowledged themselves held and firmly bound unto the plaintiff, in said writing obligatory named and styled The United States of America, in the penal sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18), above demanded to be paid to the plaintiff, the said United States, for which payment well and truly to be made, they bound themselves, their heirs, executors, administrators, successors, assigns and representatives, jointly and severally, according to the terms and conditions of said writing obligatory, which said writing obligatory, to-

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wit: bond, was and is subject to a certain condition thereunder written, as follows, to-wit:

The condition of the said bond was such that if the said principal, W. H. Schott, his or their heirs, successors, executors or administrators, should well and truly and in a satisfactory manner, fulfill and perform the stipulations of the said contract, entered into with the Secretary of the Navy, for and in behalf of the United States, and should conform in all respects to said contract, as it existed or might be modified by the parties thereto, according to its terms, and to the plans and specifications attached thereto, and forming a part thereof, and to the satisfaction of the said Secretary of the Navy, and should promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the said contract, then said obligation to be void and of no effect, otherwise to remain in full force and virtue.

And the plaintiff further avers that the creditors, to-wit: the parties for whose use and benefit this suit is brought as aforesaid, prior to the bringing of this suit, caused to be made the affidavit required by said Act of Congress, and procured from the Secretary of the United States Naval Department certified copies of said contract and bond.

6 And the plaintiff avers that the said W. H. Schott and his successors and parties representing him did, except as to the making of payments as hereinafter alleged, fulfill and perform the stipulations of the said contract and conform to the requirements thereof, and perform the same; and the plaintiff avers that performance as aforesaid and completion and final settlement of said contract, were made on, to-wit: February 11th, 1911, and that, as provided in said contract, five (5) per cent of the amount of said contract paid and to be paid said W. H. Schott, was reserved by said United States of America, to be paid at the expiration of one year from the time of completion and acceptance of the work under said contract as provided therein, and the said W. H. Schott stipulated and agreed in and by said contract that should he fail to make necessary repairs of the said work, the same might be done by the Government, to-wit: the said United States of America, at his expense, and the plaintiff avers that the place in which said contract was to be performed and executed and was performed and executed was in said Northern District of Illinois, and the plaintiff avers that no suit was brought by the United States, to-wit: the United States of

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filed Sept
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America, upon said bond within six months from the said completion and final settlement of said contract, as aforesaid.

And for a breach of the said condition of said bond, plaintiff avers that the said defendants have not, nor has either of them, or any one for them, or either of them, performed the stipulation of said writing obligatory with respect to making prompt payments to all persons who supplied said W. H. Schott, his successors and others representing him, labor and materials used in the prosecution of the work provided for in said contract, but have and has wholly failed and refused, and still refuse and refuses, so to do, and plaintiff avers that to the said Schott, his successors, and other persons representing him, as aforesaid, in the prosecution of the work provided in said contract, said James B. Clew & Sons, Standard Underground Cable Company, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company, and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Moloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, The John Davis Company, Universal Portland Cement Company, F. Bairstow, Featherstone Foundry & Supply Company, Electric Appliance Company, Western Roofing & Supply Company, and other persons, parties and corporations, did furnish and supply materials and labor of great value, the full value of which, to-wit: an amount in excess of Thirty-one Thousand Forty-seven dollars and Eighteen Cents, remains due and wholly unpaid said parties, for whose use and benefit this suit is brought as aforesaid, and plaintiff avers that all of said materials and labor furnished and supplied as aforesaid were used in the prosecution and completion of the work under said contract, and that the said value was the customary and fair value of and for said materials and labor furnished by the respective parties, persons, companies and corporations as aforesaid alleged, and was agreed to be paid them by the said W. H. Schott and his successors, or other persons representing him, as aforesaid in the premises.

And plaintiff further avers that by reason of said breach

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and of the premises as aforesaid alleged, an action has accrued to the plaintiff for the use and benefit of said
8 James B. Clow & Sons, Standard Underground Cable Company, George Racky doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Moloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, The John Davis Company, Universal Portland Cement Company, F. Bairstow Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company and said other persons, parties and corporations, to have and demand of the said defendant, Illinois Surety Company, and W. H. Schott, for the use and benefit aforesaid, the said sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents, (\$31,047.18).

And For That Whereas also, the said defendant, W. H. Schott, heretofore, to-wit: on the 30th day of July, 1908, entered into a formal contract with the plaintiff, to-wit: United States, for the construction, providing and installing at the United States Naval Training Station, Great Lakes, North Chicago, Illinois, heating and electrical distribution mains and concrete tunnel, and the furnishing of all the necessary materials, labor, tools and appliances therefor, all in conformity with the plans and specifications for said work with any modifications thereof, as provided in said contract, and the plans and specifications and addenda thereto, and plaintiff further avers that upon the making of said contract and in pursuance of the Act of Congress in Force February 24th, 1905, entitled "An Act to amend and Act Approved August 13th, 1894, entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,' " the said defendants, W. H. Schott as principal and Illinois Surety Company as surety, to-wit: the third day of August, 1908, by their certain other writing obligatory, signed and sealed with the seals of said defendants, bearing said date of to-wit, the 3rd day of August, 1908, jointly and severally acknowledged themselves held and

firmly bound unto the plaintiff, United States of America, in the penal sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18) above demanded to be paid to the plaintiff, the said United States, for which payment well and truly to be made, they bound themselves, their heirs, executors, administrators, successors, assigns and representatives, jointly and severally, according to the terms and conditions of said other writing obligatory, which said other writing obligatory was and is subject to a certain condition thereunder written, which said other writing obligatory and condition thereunder written were and are as follows, to-wit:

Declaration
filed Sep
22, 1911.

Know All Men By These Presents, That we, W. H. Schott, principal, and the Illinois Surety Company a corporation created and existing under the laws of the State of Illinois, as surety, are held and firmly bound unto The United States of America, in the penal sum of Thirty-one Thousand, Forty-seven Dollars & 18/100 (\$31,047.18) Dollars, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, assigns and representatives, jointly and severally by these presents.

Signed, sealed with our seals, and dated this 3rd day of August, A. D. 1908.

Conditions.

1. The condition of the above bond is suce, that if the said above bounden principal,
2. W. H. Schott,
3. his or their heirs, successors, executors, or administrators, shall well and truly, and in a satisfactory manner,
4. fulfill and perform the stipulations of the contract hereto annexed, entered into with the
5. Secretary of the Navy, for and in behalf of the
- 10 6. United States, and shall conform in all respects to said contract, as it now exists or may be modified by
7. the parties thereto according to its terms, and to the plans and specifications attached thereto and forming a
8. part thereof, and to the satisfaction of the said Secretary of the Navy and shall promptly make
9. payments to all persons applying him or them labor and materials in the prosecution of the work
10. provided for in the aforesaid contract, then this obliga-

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tion to be void and of no effect, otherwise to remain in
11. full force and virtue.

Note:—Words “Chief of the Bureau of Navigation, acting under the direction of the,” on the 4th and 5th lines under “Conditions” and words “Chief of the Bureau of Navigation” on the 8th line, stricken out before signing and words “Secretary of the Navy inserted on the 8th line.

W. H. SCHOTT (L. S.)
ILLINOIS SURETY COMPANY (L. S.)
By F. M. BLOUNT (L. S.)
President.

Attest:

H. W. WATKINS (L. S.)
..... (L. S.)

Signed, seal and delivered in (Seal)
the Presence of—

JNO. D. HIBBARD
W. W. DURHAM.

Navy Department,
Office of the Solicitor,

August 5, 1908.

Respectfully submitted with the recommendation that this
bond be approved.

PICKENS NEAGLE,
Law Clerk,
For the Solicitor.

August 5, 1908.

Approved,

J. E. PILLSBURY,

Acting Secretary of the Navy.

11 And the plaintiff further avers that the creditors, to-wit, the parties for whose use and benefit this suit is brought as aforesaid, prior to the bringing of this suit, caused to be made the affidavit required by said Act of Congress and procured from the Secretary of the United States Naval Department, certified copies of said contract and other writing obligatory.

And the plaintiff avers that the said W. H. Schott and his successors and parties representative him did, except as to the making of payments as hereinafter alleged, fulfill and perform the stipulations of the said contract and conform to the requirements thereof, and performed the same; and the plaintiff avers that performance as aforesaid and completion and final settlement of said contract were made on, to-wit, Feb-

bruary 11th, 1911 and that as provided in said contract, five (5) per cent of the amount thereof paid and to be paid said W. H. Schott was reserved by said United States of America, to be paid at the expiration of one year from the time of completion and acceptance of the work under said contract as provided therein, and the said W. H. Schott stipulated and agreed in and by said contract that, should he fail to make necessary repairs of the said work, the same might be done by the Government, to-wit, the said United States of America, at his expense, and the plaintiff avers that the place in which said contract was to be performed and executed and was performed and executed was in said Northern District of Illinois, and the plaintiff avers that no suit was brought by the United States, to-wit, the United States of America upon said bond within six months from the said completion and final settlement of said contract, as aforesaid.

Declaration,
filed Sept.
22, 1911.

And for a breach of the said condition of said other writing obligatory, plaintiff avers that the said defendants have not, nor has either of them, or any one for them, or either of them, performed the stipulation of said other writing obligatory with respect to making prompt payments to all persons who supplied said W. H. Schott, his successors and others representing him, labor and materials used in the prosecution of the work provided for, in said contract, but have and has wholly failed and refused, and still refuse and refuses so to do, and plaintiff avers that to the said Schott, his successors, and other persons representing him, as aforesaid, in the prosecution of the work provided in said contract, said persons for whose use and benefit this suit is brought as aforesaid alleged, did furnish and supply materials and labor of great value, the full amount of which, to-wit, an amount in excess of the amount named in said other writing obligatory, has not been paid said parties or any of them, for whose use and benefit this suit is brought; and plaintiff avers that all of said materials and labor furnished and supplied as aforesaid, were used in the prosecution and completion of the work under said contract, and that the said value was the customary and fair value of and for said materials and labor furnished by the respective parties, persons, companies and corporations as aforesaid alleged, and was agreed to be paid them by the said W. H. Schott and his successors, or other persons representing him, as aforesaid, in the premises.

ration,
Sept.
1911.

And plaintiff further avers that by reason of said breach and of the premises as aforesaid in this count alleged, an action has accrued to the Plaintiff for the use and benefit of said James B. Clow & Sons, Standard Underground Cable Company, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Moloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, The John Davis Company, Universal Portland Cement Company, F. Bairstow, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, and said other persons, parties and corporations, to have and demand of the said defendants, Illinois Surety Company, and W. H. Schott, for the use and benefit aforesaid, the said sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18).

Yet the said defendants, although often requested, have not, nor has either of them or any one for them, paid the said several sums or any part thereof, to the plaintiff or to the said parties for whose use this suit is brought as aforesaid, but on the contrary have wholly neglected and refused, and still do neglect and refuse so to do, to the damage of the plaintiff for the use and benefit aforesaid of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18), and therefore the plaintiff for the use and benefit aforesaid, brings this suit, etc.

(Sgd.) WYETH & SMITH
 “ KNAPP, CAMPBELL and RALPH E. CHURCH
 “ ISAAC M. JORDAN,
 “ HOLT, WHEELER & SIDLEY,
 “ M. B. MOULTON,
 “ JOHN D. CLANCY,

Attorneys for Plaintiff.

57 And on to-wit: the twenty-ninth day of September, 1911, in the record of proceedings thereof in said entitled cause before the Hon. K. M. Landis, District Judge, appears the following entry to-wit. Order of Se
29, 1911.

58 United States of America, for the use of James B. Clow & Sons, <i>et al.</i> <i>vs.</i> Illinois Surety Company, a Corp and W. H. Schott.	}	30486.
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On motion of Charles A. Daniel, trading as The Quaker City Rubber Company, it is hereby ordered that said Charles A. Daniel, trading as The Quaker City Rubber Company, be and he is hereby given leave to file his claim in the above entitled cause and to become a party thereto as provided by the United States Compiled Statute, Title 43, page 493 1905 Supplement.

59 And on the same day to-wit: the twenty-ninth day of September, 1911, come Charles A. Daniel, trading as The Quaker City Rubber Company and by leave of court first had and obtained filed in the Clerk's office of said Court its certain claim in words and figures following to-wit:

n of
Charles A.
Daniel, filed
Oct. 29, 1911.

60

CLAIM OF CHARLES A. DANIEL

IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

October Term, A. D. 1911.

United States of America, for the use of James B. Clow & Sons. <i>et al.</i> <i>vs.</i>	} No. 30486. In Debt. Damages \$31047.18
Illinois Surety Company, a Corp., and W. H. Schott.	

Claim of Charles A. Daniel Trading as the Quaker City Rubber Company.

Charles A. Daniel respectfully represents that under the trade name of The Quaker City Rubber Company, he has his chief place of business in the City of Philadelphia, County of Philadelphia and State of Pennsylvania, and that under the said trade name he is engaged, among other things, in the business of manufacturing and selling mechanical rubber goods, belting, hose, packings, molded goods, etc., and that as alleged in the declaration heretofore filed in the above entitled cause, the above defendant W. H. Schott on to-wit, the 30th day of July, 1908, entered into a contract with the United States of America to construct, provide and install at the United States Naval Training Station in North Chicago, heating and electric distribution mains and concrete tunnels and appliances therefor, and that the Illinois Surety Company a corporation existing under and by virtue of the laws of the State of Illinois, became under date of August 3, 1908, firmly bound unto the United States in the penal sum of

61 \$31047.18 conditioned, among other things, upon the faithful performance of the above mentioned contract between the said W. H. Schott and the United States, and that he should promptly make payments to all persons supplying him or them with rubber and materials in the construction of the work provided for in the aforesaid contract.

Charles A. Daniel, trading as The Quaker City Rubber

Company, claimant herein, further represents that it is a creditor of the said defendant W. H. Schott for special marine packing and ebonite sheet packing sold and delivered to said defendant at its request, to the amount of \$630.33 contracted for as follows: August 14, 1909, \$588.00; September 14, 1909, \$34.45 and November 29, 1909, \$37.88; that said goods were necessary for the construction of the said heating and electric distribution mains and concrete tunnels at the said Naval School at North Chicago.

Claim of
Charles A.
Daniel, filed
Sept. 29, 1911

Claimant further represents that the United States Compiled Statutes, Title 43 found at page 493 in the 1905 Supplement of said Statutes, provides, among other things, that where suit is instituted by any creditors on the bond of the contractor, only one action shall be brought and any creditor may file his claim in said action and be made a party thereto within one year from the completion of the work under said contract.

Claimant therefore prays that it be granted leave to file its claim in the above entitled cause and be made party thereto for the purpose of protecting and preserving its said lien under said statute.

CHARLES A. DANIEL, trading as
THE QUAKER CITY RUBBER COMPANY,
By TENNEY, COFFEEN, HARDING & SHERMAN,
Attorneys.

(Endorsed) Filed Sep 29, 1911, John H. R. Jamar, Clerk.

62 And on to-wit: the twenty-fourth day of October, 1911, come W. H. Schott by his attorney and filed in the Clerk's office of said Court his certain Plea to the Declaration in words and figures following to-wit.

of W. H.
Schott filed
Oct. 24, 1911.

63

PLEA OF W. H. SCHOTT.

IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.
October Term, A. D. 1911.

United States of America, for the use
and benefit of James B. Clow &
Sons, a corporation, *et al.*

Plaintiff,

—vs—

Illinois Surety Company, a corpora-
tion, and W. H. Schott,

Defendants.

And now comes W. H. Schott, one of the above Defendants, and by W. N. Horner, his attorney, says *actio non*, as to the United States of America and as to James B. Clow & Sons, a corporation, Standard Underground Cable Company, a corporation, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company, and Corrugated Bar Company, a corporation, United States Equipment Company, a corporation, James P. Marsh & Company, a corporation, Raymond Lead Company, a corporation, Scott Valve Company, a corporation, George B. Carpenter & Company, a corporation, The Roebling Construction Company, a corporation, The Western Kiely Steam Specialty Company, a corporation, H. W. Johns-Manville Company, a corporation, Davies Supply Company, a corporation, Racine Stone Company, a corporation, Stebbins Hardware Company, a corporation, Commonwealth Edison Company, a corporation, H. Channon Company, a corporation, Moloney Electric Company, a corporation, Nancy W. Watrous, doing business as G. B. Watrous Sons, The John Davis Company, a corporation, Universal Portland Cement Company, a corporation, F. Bairstow Featherstone Foundry & Machine Company, a corporation, Electric Appliance Company, a corporation, Western Roofing & Supply Company, a corporation, Guarantee Electric Company, a corporation, German-American Paint Company, a corporation, Quaker City Rubber Company, a corporation, Barret Manufacturing Company, a cor-

poration, Fairbanks, Morse & Company, a corporation, Yonkers Electric Manufacturing Company, a corporation, and The Nelson Machine Company, a corporation, Plaintiffs who sue as aforesaid;

Plea of W. H. Schott filed
Oct. 24, 1911

Because he says, that after the several supposed debts and causes of action in said declarations mentioned were contracted and accrued and were due and payable, and before the commencement of this suit, to-wit, on the 22nd day of September, A. D. 1911, he, the said Defendant, became a bankrupt, within the true intent of the meaning of the statute in force concerning bankrupts, to-wit: at Chicago, Cook County, and State of Illinois, on—to-wit, the 21st day of March, A. D. 1910, aforesaid, and that the said debts were contracted, and the said causes of action in the said declaration mentioned, and each of them, did accrue to the said Plaintiffs and were due and payable before he, the said Defendant, so became a bankrupt, as aforesaid, and were a fixed liability, absolutely owing at the time of the filing of the petition in the said bankruptcy proceedings:

And the Defendant further avers that the Plaintiffs herein were duly scheduled as creditors of the said bankrupt and were duly notified as required by law, and that the Plaintiffs herein received due notice that on, to-wit, the 3rd day of October, A. D. 1910, the said bankrupt would make application for his discharge in bankruptcy and that on, to-wit, the said 3rd day of October, A. D. 1910, he was duly discharged, etc. and this the Defendant is ready to verify.

Wherefore, he prays judgment, etc.

(Signed) W. H. SCHOTT,
Defendant.

65 State of Illinois, {
County of Cook. } ss.

W. H. Schott, being first duly sworn on oath, states that he is one of the Defendants in the above entitled cause; that he has read the foregoing plea by him subscribed and knows the contents thereof, and that the same is true.

(Signed) W. H. SCHOTT.

Subscribed and Sworn to before me this 23rd day of October, A. D. 1911.

(Signed) CHARLES R. SCOTT,
Notary Public.
(Notary Seal)
Filed October 24th, 1911, John H. R. Jamar, Clerk.

demurrer of
Illinois
Surety Co.,
dated Nov.
1911.

66 And on to-wit: the seventh day of November, 1911, come the Illinois Surety Company by its attorney and filed in the Clerk's office of said Court in said entitled cause its certain demurrer to the declaration. Said demurrer is in the words and figures following to-wit:

67 DEMURRER TO DECLARATION.

IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.
October Term, A. D. 1911.

United States of America, for the use and benefit of James B. Clow & Sons, a corporation, <i>et al.</i> ,	} No. 30486. In Debt.
<i>Plaintiff,</i>	
—vs—	
Illinois Surety Company, a corpora- tion, and W. H. Schott,	} No. 30486. In Debt.
<i>Defendants.</i>	

And the defendant, Illinois Surety Company, a corporation, by Hopkins, Peffers & Hopkins, its attorneys, comes and defends, etc., when, etc., and says that the said declaration and each count thereof, and the matters therein contained, in manner and form, as the same are above set forth, are not sufficient in law for the plaintiff to maintain its aforesaid action, and that it, this defendant, is not bound by law to answer the same, and this it is ready to verify;

Wherefore, for want of a sufficient declaration in this behalf the defendant prays judgment and that the plaintiff may be barred from maintaining its aforesaid action, etc.

HOPKINS, PEFFERS & HOPKINS,
Attorneys for defendant, Illinois Surety Company.

68 I, James S. Hopkins, one of the attorneys for the defendant, Illinois Surety Company, a corporation, in the above entitled cause, do hereby certify that in my opinion the foregoing demurrer of the defendant, Illinois Surety Com-

pany, a corporation, to the declaration of the United States of American, for the use and benefit of James B. Clow & Sons, a corporation, et al., plaintiff is well founded in law and proper to be filed in the above cause.

Demurrer
Illinois
Surety Co.
filed Nov
7, 1911.

JAMES S. HOPKINS,
*One of the Attorneys for the Illinois
Surety Company, defendant.*

69 United States of America }
Northern District of Illinois } ss

Charles E. Schick being duly sworn on oath, deposes and says that he is secretary of the defendant, Illinois Surety Company, a corporation, in the above entitled cause; that he has heard read the foregoing demurrer to the declaration of the United States of America, for the use and benefit of James B. Clow & Sons, a corporation, et al., plaintiff in this cause, and that the said demurrer is not interposed for the purpose of delaying said suit or any proceedings therein, but that justice may be done.

CHARLES E. SCHICK

Subscribed and Sworn to before me this 7th day of November, A. D. 1911.

J. HOWARD CAHILL

(Notarial Seal)

Notary Public.

(Endorsed) Filed Nov. 7, 1911, John H. R. Jamar, Clerk.

70 And on to-wit: the twenty-fourth day of April, 1912, in the record of proceedings in said entitled cause in the District Court of the United States for the Northern District of Illinois, before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

er of Apr.
1, 1912.

IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Wednesday, April 24, 1912

United States of America, for the use
and benefit of James B. Clow &
Sons, a corporation, *et al.*

—vs—

Illinois Surety Company, a corpora-
tion, and W. H. Schott.

No. 30,486.

From inspection and consideration of the affidavits on file herein, and exhibits thereto attached, and the order of court entered herein on October 11, 1911, the court doth find that personal notice of the pendency of this suit has been given all known creditors, in compliance with the directions of said order, and that in addition thereto due publication of notice has been made herein, according to law and in compliance with said order of October 11, 1911.

A. L. SANBORN,
Judge

71 And on to-wit: the twenty-fourth day of April, being one of the days of the April 1912, term of said Court, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

United States of America, etc. }
vs. } 30486.
 Illinois Surety Company, *et al.* }

Order of A
 24, 1912.

Now come the parties by their attorneys, upon motion of the plaintiff, leave is hereby granted said plaintiff to amend the declaration by filing amendments thereto instanter, and the defendants herein are ruled to plead or demur to the same within ten days.

72 And on the same day to-wit: the twenty-fourth day of April, 1912, come the Plaintiff in said entitled cause by its attorney and by leave of Court first had and obtained filed in the Clerk's office of said Court its certain Amendments to Declaration in words and figures following to-wit.

Amendment
 to declar
 tion, filed
 Apr. 24, 1912.

73 AMENDMENTS TO DECLARATION.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America, For use of }
 James B. Clow & Sons, *et al.* } Debt.
vs. } 30486.
 Illinois Surety Company, and W. H. }
 Schott: }

Comes now the plaintiff herein and by leave of court amends its first count of declaration herein by striking out therefrom the following: "And the plaintiff avers that performance as aforesaid and completion and final settlement of said contract were made on, to-wit, February 11th, 1911, and that, as provided in said contract, five (5) per cent of the amount of said contract paid and to be paid said W. H. Schott was reserved by said United States of America, to be paid at the expiration of one year from the time of completion and acceptance of the work under said contract as provided therein, and the said W. H. Schott stipulated and agreed in and by said contract that should he fail to make necessary

Amendments
to declaration,
filed
Apr. 24, 1912.

repairs of the said work, the same might be done by the Government, to-wit, the said United States of America, at his expense," and by inserting in place thereof the following:

And the Plaintiff avers that it was provided in and by the said contract in the specifications thereof, as follows, namely:

"39. Payments.—Payments will be made by the Navy Department monthly upon public bills, based on monthly estimates and the schedule of unit prices above described, certified by the officer in charge and approved by the Commandant and the Chief of the Bureau of Navigation. Ten per cent of the amount of each monthly estimate will be withheld until the completion and acceptance of the work. One-half the amount of the reservations thus withheld will then be
74 paid upon public bills certified and approved as above, the remaining one-half of said reservations to be so paid at the expiration of one year from the time of the completion and acceptance of the work, subject, however, to the provisions of paragraph 56 of these specifications.

40. All warrants for payments under the contract shall be made payable to the contractor or his order at such navy pay office as the party of the second part may designate. Before final payment under the contract, and as a condition precedent to such payment, the contractor shall execute and deliver to the party of the second part a full and final release to the United States, in such tenor and form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of the contract.

41. The monthly payments on the work during its progress shall not be considered or understood to be a final acceptance of the work in question, and any work or material which is of an inferior quality, or proves unsatisfactory in any respect, at any time, shall be rejected and replaced by the contractor to the satisfaction of the officer in charge of the work, notwithstanding that payments have been made upon such work or material."

"45. Guaranty.—The contractor shall guarantee all work and materials and keep same in perfect repair and condition for period of one year after the completion and acceptance, unless hereinafter, or in the contract, otherwise stipulated. Defects of any kind appearing during that period must be made good by the contractor at his expense when called upon to do so, and all to the entire satisfaction of the Commandant. All work must be in perfect condition at the end of the period above named."

"56. Reservation.—One-half of the 10 per cent reservation hereinbefore provided to be made on all payments will be held for a period of one year after the completion and acceptance of the work. And the contractor agrees that should he fail to make necessary repairs the same may be done by the Government at his expense.

Amendments
to declaration,
filed
Apr. 24, 1911

And the plaintiff avers that performance as aforesaid and completion and final settlement of the contract were made, on to-wit, February 11th, 1911, and that as provided in said contract and specifications, the said United States upon said completion and final settlement of said contract, made and withheld said reservation, to-wit, one half of the said ten per cent reservations as provided in said specifications.

Comes now the plaintiff herein and by leave of court amends its second count of declaration herein by striking out therefrom the following: "And the plaintiff avers that performance as aforesaid and completion and final settlement of said contract were made on, to-wit, February 11th, 1911, and 75 that, as provided in said contract, five (5) per cent of the amount of said contract paid and to be paid said W. H. Schott was reserved by said United States of America, to be paid at the expiration of one year from the time of completion and acceptance of the work under said contract as provided herein, and the said W. H. Schott stipulated and agreed in and by said contract that should he fail to make necessary repairs of the said work, the same might be done by the Government, to-wit, the said United States of America, at his expense," and by inserting in place thereof the following:

And the plaintiff avers that it was provided in and by the said contract in the specifications thereof, as follows, namely:

"39. Payments.—Payments will be made by the Navy Department monthly upon public bills, based on monthly estimates and the schedule of unit prices above described, certified by the officer in charge and approved by the Commandant and the Chief of the Bureau of Navigation. Ten per cent of the amount of each monthly estimate will be withheld until the completion and acceptance of the work. One-half the amount of the reservations thus withheld will then be paid upon public bills certified and approved as above, the remaining one-half of said reservations to be so paid at the expiration of one year from the time of the completion and acceptance of the work, subject, however, to the provisions of paragraph 56 of these specifications.

Amendments
to Declaration
No. 24, 1912.

40. All warrants for payments under the contract shall be made payable to the contractor or his order at such navy pay office as the party of the second part may designate. Before final payment under the contract, and as a condition precedent to such payment, the contractor shall execute and deliver to the party of the second part a full and final release to the United States, in such tenor and form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of the contract.

41. The monthly payments on the work during its progress shall not be considered or understood to be a final acceptance of the work in question, and any work or material which is of an inferior quality, or proves unsatisfactory in any respect, at any time, shall be rejected and replaced by the contractor to the satisfaction of the officer in charge of the work, notwithstanding that payments have been made upon such work or material."

"45. Guaranty.—The contractor shall guarantee all work and materials and keep same in perfect repair and condition for a period of one year after the completion and acceptance, unless hereinafter, or in the contract, otherwise stipulated. Defects of any kind appearing during that period must be made good by the contractor at his expense when called upon to do so. and all to the entire satisfaction of the Commandant. All work must be in perfect condition at the end of the period above named."

76 "56. Reservation.—One-half of the 10 per cent reservation hereinbefore provided to be made on all payments will be held for a period of one year after the completion and acceptance of the work. And the contractor agrees that should he fail to make necessary repairs the same may be done by the Government at his expense."

And the plaintiff avers that performance as aforesaid and completion and final settlement of the contract were made, on to-wit, February 11th, 1911, and that as provided in said contract and specifications, the said United States upon said completion and final settlement of said contract, made and withheld said reservation, to-wit, one half of the said ten per cent reservation, as provided in said specifications.

WYETH & SMITH,
KNAPP & CAMPBELL, &
RALPH E. CHURCH,
Attorneys for Plaintiff.

(Endorsed) Filed April 24, 1912, T. C. MacMillan, Clerk.

77 And on to-wit: the fourth day of May, 1912, in the record of proceedings thereof in said entitled cause before the Hon. K. M. Landis, District Judge, appears the following entry to-wit:

Order of May 4, 1912.

United States of America, for use, etc. }
vs. } 30486.
 Illinois Surety Company, *et al.* }

On motion of defendant, W. H. Schott, it is ordered by the Court that the plea on file herein stand to the declaration as amended.

78 And on to-wit: the second day of May, 1912, come Illinois Surety Company by its attorney and filed in the Clerk's office of said Court in said entitled cause its certain Demurrer to Amended Declaration in words and figures following to-wit:

Demurrer to amended declaration, filed May 2, 1912.

79 DEMURRER TO AMENDED DECLARATION.

IN THE DISTRICT COURT OF UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America, for use of }
 James B. Clow & Sons, *et al.* }
 —*vs.*— } Debt.
 Illinois Surety Company and W. H. } 30486.
 Schott. }

And the said defendant, Illinois Surety Company, by Hopkins, Peffers & Hopkins, its attorneys, comes and defends the wrong and injury, when, etc., and says that the plaintiffs' said declaration and each count thereof, and the matters and things therein contained, in manner and form as the same are above set forth, are not sufficient in law for them, the said plaintiffs, to have and maintain their aforesaid action against it, the said defendant, and that it, the said defendant, is not bound by law to answer the same, and this it is ready to

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ation, filed
y 2, 1912.

verify, wherefore, for want of a sufficient declaration and either count thereof in this behalf, the said defendant prays judgment, etc.

And for special causes of demurrer the said defendant shows to the court the following:

I. The allegation in said declaration and each count thereof that "final settlement" of the said contract in said counts described was made on, to-wit: February 11, 1911, is a legal conclusion and insufficient.

80 II. Said declaration does not set forth sufficient facts so that the court can determine that "final settlement" of the said contract, in the said counts mentioned, was had on February 11, 1911, as charged in said declaration and each count thereof.

III. Neither count of the said declaration shows or avers that the amount finally due or to become due said contractor, W. H. Schott, was fixed, determined or settled on February 11, 1911.

IV. Neither count of said declaration alleges that the condition precedent prescribed by paragraph 39 set forth in said counts in relation to payments had been complied with nor that the commandant and the chief of the Bureau of Navigation have certified or approved the amounts due said contractor.

V. Before the amount due said contractor could be ascertained, settled or fixed, under the paragraphs of the said contract set forth in the said counts it is necessary as conditions precedent that public bills be certified and approved by the officers of the Government named in said paragraphs, and said counts fail to aver that the Five Per cent (5%) reserved had been settled, fixed or determined by said commandant or said chief of the Bureau of Navigation, as provided in said contract.

VI. The amount to be paid the contractor, of the Five Per cent (5%) reserved under the said paragraphs of the said contract, is to be fixed and determined by said com-
81 mandant and chief of the Bureau of Navigation, and there is no allegation in the said declaration or either count thereof that the said Five Per cent (5%) reserved, or any portion thereof, had been certified to and approved by said officers as due the said contractor at the time of said alleged settlement of February 11, 1911.

VII. The said declaration and each count thereof fails to show that the said commandant and the chief of the Bureau of

Navigation have finally ascertained, fixed and settled the amount due the said contractor.

VIII. The ascertainment by said commandant and the chief of the Bureau of Navigation and their approval are condition precedent necessary to the determination of the amounts, if any, finally due the said contractor.

HOPKINS PEFFERS & HOPKINS

Attorneys for Illinois Surety Company.

82 I hereby certify that the above and foregoing demurrer is not filed for the purpose of delay, but that justice may be done and that the same is in my opinion well founded in point of law.

DAVID J. PEFFERS

One of Attorneys for Illinois Surety Company.

83 State of Illinois }
County of Cook } ss.

David J. Peffers being duly sworn upon oath, deposes and says that he is one of the attorneys for the Illinois Surety Company, defendant in the above entitled cause; that the above and foregoing demurrer is not filed for the purpose of delay but that justice may be done the said defendant, Illinois Surety Company, in said cause.

DAVID J. PEFFERS.

Subscribed and Sworn to before me this 2nd day of May, A. D. 1912.

J. HOWARD CAHILL

(Notarial Seal) *Notary Public, Cook County, Ill.*
(Endorsed) Filed May 2, 1912, T. C. MacMillan, Clerk.

84 And on to-wit: the fourth day of May, 1912, come the plaintiff in said entitled cause by its attorney and filed in the Clerk's office of said Court its certain Demurrer to Plea of W. H. Schott. Said Demurrer is in the words and figures following to-wit.

Demurrer to
amended de
claration, fil
May 2, 1912

urrer to
ea of W. H.
hott, filed
ay 4, 1912.

85 DEMURRER OF PLTFFS TO PLEA OF W. H. SCHOTT.

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

United States of America, For use and benefit of James B. Clow & Sons, a corporation, <i>et al</i> , (Plaintiff),	} Debt Number 30486.
—vs—	
Illinois Surety Company, a corpora- tion, and W. H. Schott, (Defendants).	

And the plaintiff, as to the plea of the defendant, W. H. Schott, filed to the declaration as amended, in said cause, as to the United States of America and as to James B. Clow & Sons and others as named in said plea, says that the same and the matters and things therein contained, in manner and form as the same are in said plea set forth, are not sufficient in law to bar the said plaintiff from having the aforesaid action and that the plaintiff is not bound by law to answer the same.

And the plaintiff shows to the court here the following causes of demurrer to the said plea:

First:—That the said plea is indefinite and uncertain in that it does not distinguish whether the several supposed debts and causes of action in said declaration mentioned were and are the writing obligatory sued upon in said cause or the debts set forth in said declaration as unpaid to the said James B. Clow & Sons and other parties as mentioned in said plea.

Second:—Said plea is indefinite and uncertain in that the same does not allege and show that the said several supposed debts and causes of action were debts and causes of
86 action incurred by the said defendant, W. H. Schott.

And the said plea is otherwise informal, uncertain and indefinite.

And this the plaintiff is ready to verify, wherefore for want

of sufficient plea in this behalf the plaintiff prays judgment, etc., and its damages, etc.,

Demurrer to
plea of W.
Schott, filed
May 4, 1912

WYETH & SMITH,
KNAPP & CAMPBELL and
RALPH E. CHURCH,

Attorneys for Plaintiff.

87 I, Newton Wyeth, one of the attorneys for the Plaintiff in the above entitled cause, do hereby certify that in my opinion the foregoing demurrer of the Plaintiff to the Plea of the Defendant, W. H. Schott, is well founded in law and proper to be filed in the above entitled cause.

NEWTON WYETH

One of the Attorneys for the Plaintiff.

United States of America
Northern District of Illinois,
State of Illinois,
County of Cook. } ss.

Newton Wyeth being duly sworn on his oath, deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause and that he has read the foregoing demurrer to the plea of the defendant, W. H. Schott, in said cause, and that the said demurrer is not interposed for the purpose of delaying said suit or any proceedings therein, but that justice may be done.

NEWTON WYETH.

Subscribed and sworn to before me this 4th day of May, A. D. 1912.

JOHN E. LAKE,

Notary Public.

(Seal)

Endorsed) Filed May, 4, 1912, T. C. MacMillan, Clerk.

88 And on to-wit: the thirteenth day of May, 1912, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn District Judge, appears the following entry to-wit:

er of May
1912.

United States of America for use etc. }
vs. } 30486.
Illinois Surety Company, *et al.*

Now come the parties by their attorneys and the Court having considered and being now fully advised in the premises,

It is Ordered that the demurrer of the Illinois Surety Company be and the same is hereby overruled and the defendants are hereby ruled to plead to the declaration within ten days.

a of Illinois
Surety Co. to
amended dec-
laration, filed
May 22, 1912.

89 And on to-wit: the twenty-second day of May 1912, come Illinois Surety Company by its attorney and filed in the Clerk's office of said Court its certain Pleas to the Amended Declaration. Said Pleas are in words and figures following to-wit:

90 PLEAS OF DEFENDANT, ILLINOIS SURETY
COMPANY TO THE AMENDED DECLARA-
TION.

IN THE CIRCUIT COURT OF THE UNITED STATES
Northern District of Illinois

Eastern Division.

October Term, A. D. 1911.

United States of America, for the use
and benefit of James B. Clow &
Sons, a corporation, *et al.*,
Plaintiffs, }
vs. } Gen. No. 30486.
Illinois Surety Company, a corpora-
tion, and W. H. Schott,
Defendants. }

Pleas of Defendant, Illinois Surety Company, to the Amended Declaration.

1. And the Illinois Surety Company, one of the above named defendants, by Hopkins, Peffers & Hopkins, its attorneys, comes and defends the wrong and injury, when, etc., and says that it does not owe the said sum of money, above

Plea of Ill.
Surety Co.
amended
laration,
May 22,

demanded by the said plaintiffs, or either of them, or any part thereof, in manner and form as the plaintiffs, and each of them, have above complained against it, and of this, the said defendant puts itself upon the country, etc.

2. And for further plea in this behalf the said defendant, Illinois Surety Company, by its said attorneys, comes and defends the wrong injury, when, etc., and says that the said plaintiff ny of them, ought not to have
91 or maintain their esaid action against it, this defendant, because it says that the said plaintiffs, nor any or either of them, have not at any time since the making of the said writing obligatory and conditions thereof been in anywise damnified by reason of any matter or thing in the said condition mentioned, and this, this defendant, is ready to verify; wherefore, it prays judgment if the plaintiffs, or any or either of them, ought to have or maintain their aforesaid action against it, etc.

3. And for further plea in this behalf the said defendant, Illinois Surety Company, by its said attorneys, comes and says that if the said plaintiffs, or any or either of them, have been damnified, for or by reason or means or on account of, any matter, cause or thing in the said condition mentioned, the said plaintiffs, and each of them, have been damnified of their own wrong and by and through their and each of their own means or default, and this it is ready to verify; wherefore, it, the said defendant, prays judgment if the said plaintiffs or either of them ought to have or maintain their aforesaid action against it, etc.

4. And for further plea in this behalf to said amended declaration the said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that the plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action because it, the said defendant, says that performance and completion and final settlement of the said contract in the said declaration mentioned
92 tioned were not made on or about February 11, 1911, as charged in said declaration and each count thereof, and of this the defendant puts itself upon the country.

5. And for further plea in this behalf the said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that the plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action against it, the said defendant, because it says that final settlement of the said contract was not made on or about February,

plea of Illinois
Surety Co. to
amended dec-
laration, filed
May 22, 1912.

11, 1911, as charged in said declaration and each count thereof, and of this the defendant puts itself upon the country.

6. And for further plea in this behalf, said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that said plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action against it, the said defendant, because it, the said defendant, says that the said plaintiffs, or any or either of them did not furnish and supply labor and material, or either of the same, to the said contractor, Schott, in the prosecution of the said work provided in the said contract, and of this the defendant puts itself upon the country, etc.

7. And for a further plea in this behalf as to the labor and material claimed by said plaintiffs, and each of them to have been furnished and supplied after January 2, 1909, on and for the said work mentioned in said declaration, the

said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that the said plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action against it, the said defendant, for such labor and material furnished after said date because it, the said defendant, says that on January 2, A. D. 1909, the said contractor, W. H. Schott, offered in writing to the Schott Engineering Company, a corporation, for a valuable consideration, to sell, assign, transfer and set over to the said Schott Engineering Company, all right, title and ownership in and to the said contract made and entered into between the said Schott and the United States Government mentioned and described in the declaration herein; that the said proposition was based upon its prompt acceptance at the taking over by the Schott Engineering Company of the said contract, mentioned in the said declaration, as of January 1st, 1909, and the assuming by said Schott Engineering Company of all responsibility in the matter of the said contract and the relieving of said Schott of any and all liability pertaining thereto. That thereafter the Board of Directors of the said Schott Engineering Company, at a meeting, duly held January 2, 1909, adopted a resolution by a unanimous vote, in and by which resolution the said corporation accepted the said proposal and offer of the said W. H. Schott, and said W. H. Schott did then and there sell, assign, transfer and set over unto the said Schott Engineering Company all right, title and interest in and to the said contract, and said Schott Engineering Company did then and there

thereafter do all the work and buy all the material and hire all the labor in the performance of said contract described in said declaration; that the said Schott had nothing further to do with the work required to be done by, or in the performance of, the said contract.

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Surety Co.
amended declaration,
May 22, 19

94 Defendant further avers that as to so much of the said declaration as assigns breaches on the liability of this defendant to pay for labor and material that was furnished and supplied upon the said work after January 2nd, A. D. 1909, this defendant says that all of such labor and material was sold, furnished and supplied by the said plaintiffs, and each of them, to the said Schott Engineering Company, a corporation, and without the knowledge or consent of this defendant thereto. And this, this defendant is ready to verify; wherefore, it prays judgment if the said plaintiffs, or any or either of them, ought to have or maintain their aforesaid action against it, this defendant, as to the alleged breaches for labor and materials supplied the said Schott Engineering Company as aforesaid after January 2nd, A. D. 1909, etc.

8. And for further plea in this behalf as to the claims of the said plaintiffs, to-wit: Stebbins Hardware Co., Universal Portland Cement Co., Featherstone Foundry & Machine Co., Davies Supply Co., Scott Valve Co., Western Roofing & Supply Co., Electric Appliance Co., H. W. Johns-Manville Co., Standard Underground Co., John Davis Co., D. E. Garrison, Jr., doing business, etc., James P. Marsh & Co., Raymond Lead Co., Racine Stone Co., George B. Carpenter & Co., and Charles A. Daniel, trading as Quaker City Rubber Co., the said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that the said mentioned plaintiffs are, and each of them is estopped and ought not to be permitted or heard to maintain their aforesaid action against this defendant because it, the said defendant, says that on January 2nd, A. D. 1909, the said contractor,

95 W. H. Schott, offered in writing to the Schott Engineering Company, a corporation, for a valuable consideration, to sell, assign, transfer and set over to the said Schott Engineering Company, all right, title and ownership in and to the said contract made and entered into between the said Schott and the United States Government, mentioned and described in the declaration herein; said proposition was based upon its prompt acceptance and the taking over by the Schott Engineering Company of the said contract mentioned in the said declaration as of January 1st, 1909, and the assuming by

ea of Illinois
Surety Co. to
amended dec-
laration, filed
May 22, 1912.

said Schott Engineering Company of all responsibility in the matter of the said contract and the relieving of said Schott of any and all liability pertaining thereto. That thereafter the Board of Directors of the said Schott Engineering Company, at a meeting duly held January 2, 1909, adopted a resolution by a unanimous vote, in and by which resolution the said corporation accepted the said proposal and offer of the said W. H. Schott, and the said W. H. Schott did then and there sell, assign, transfer and set over unto the said Schott Engineering Company all right, title and interest in and to the said contract and the said Schott Engineering Company did then and there and thereafter do all the work and buy all the material and hire all the labor in the performance of said works described in said declaration; that the said Schott had nothing further to do with the work required to be done by, or the performance of, the said contract.

Defendant further avers that thereafter, on or about January 27, 1910, the Schott Engineering Company was adjudged a bankrupt in the District Court of the United States, for the Northern District of Illinois, and that thereafter the said claimants, in this plea above named, filed with the Referee in Bankruptcy in the bankruptcy proceedings of the said Schott Engineering Company claims that were sworn to, in and by

which said several claims the said claimants, hereinabove mentioned, and each of them, did aver upon oath that they and each of them furnished the labor and material sought to be recovered for in this suit to said Schott Engineering Company and that said Schott Engineering Company was and still is justly and truly indebted to the said claimants, and each of them, for the same labor and materials sought to be recovered for in this suit.

This defendant further avers that by reason of the premises the said claimants, and each of them, are estopped from maintaining their said claims against this defendant; wherefore, it the said defendant, prays judgment if the said claimants, and each of them, ought to be admitted against their aforesaid dealings and actions to have or maintain this their said suit against this defendant.

9. And for a further plea in this behalf as to the claims of the said plaintiffs, to-wit: Stebbins Hardware Co., Universal Portland Cement Co., Featherstone Foundry & Machine Co., Davies Supply Co., Scott Valve Co., Western Roofing & Supply Co., Electric Appliance Co., H. W. John-Manville Co., Standard Underground Co., John Davis Co., D. E. Garri-

son, Jr., doing business, etc., James P. Marsh & Co., Raymond Lead Co., Roebling Construction Co., Western Kiely Steam Specialty Co., Racine Stone Co., George B. Carpenter and Charles A. Daniel, trading as Quaker City Rubber Co., the said defendant, Illinois Surety Company, by its said attorneys, comes and defends, etc., and says that the said mentioned plaintiffs are, and each of them is estopped and ought not to be permitted or heard to maintain their aforesaid action against this defendant, because it, the said defendant, 97 says that on January 2nd, A. D. 1909, the said contractor,

W. H. Schott, offered in writing to the Schott Engineering Company, a corporation, to sell, assign, transfer and set over to the said Schott Engineering Company, all right, title and ownership in and to the said contract made and entered into between the said Schott and the United States Government, mentioned and described in the declaration herein; that the said proposition was based upon its prompt acceptance and the taking over by the Schott Engineering Company of the said contract mentioned in the said declaration as of January 1st, 1909, and the assuming by said Schott Engineering Company of all responsibility in the matter of the said contract and the relieving of said Schott of any and all liability pertaining thereto. That thereafter the Board of Directors of the said Schott Engineering Company, at a meeting duly held January 2, 1909, adopted a resolution by a unanimous vote, in and by which resolution the said corporation accepted the said proposal and offer of the said W. H. Schott and the said W. H. Schott did then and there sell, assign, transfer and set over unto the said Schott Engineering Company all right, title and interest in and to the said contract and the said Schott Engineering Company did then and there and thereafter do all the work and buy all the material and hire all the labor in the performance of said works, described in said declaration; that the said Schott had nothing further to do with the work required to be done by, or the performance of, the said contract.

Defendant further avers that on or about the 14th day of January, 1910, a petition of involuntary bankruptcy was filed against the said Schott Engineering Company, a corporation as aforesaid, and The Central Trust Company of Illinois, a corporation organized under the laws of the State of Illinois, was appointed receiver of the estate of the said Schott Engineering Company by an order of the District Court of the 98 United States of the Northern District of Illinois, East-

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of Illinois
Surety Co. to
amended dec-
laration, filed
May 22, 1912.

ern Division, and that immediately upon its appointment as such receiver, it took possession of the property and assets of the said bankrupt.

Defendant further avers that thereafter, on or about January 27th, 1910, the said Schott Engineering Company was, by an order entered in the said District Court of the United States for the Northern District of Illinois, adjudged a bankrupt; that thereafter, on to-wit: January 31st, 1910, said receiver of the said bankrupt, The Central Trust Company of Illinois, filed its petition in the said District Court of the United States, representing to the court that the said W. H. Schott had entered into the said contract described in the declaration with the United States Government, and further represented to the court that early in the month of January, 1909, the said Schott sold, assigned and transferred to the said Schott Engineering Company, the above-named bankrupt, all right, title and interest in and to the aforesaid contract with the United States Government; and further represented to the court that since the organization of the Schott Engineering Company, on or about January 2nd, 1909, all of the work under said contract was performed by the Schott Engineering Company, the said bankrupt, and at the time that the said receiver was appointed, the said Schott Engineering Company was engaged upon the work, and prayed instructions of the court as to whether or not the said receiver should continue with said work and complete the same.

Defendant further avers that said court upon said petition, entered an order that the said receiver should continue with the work in hand until February 8th, 1910, and that the receiver should notify the creditors by letter, of the condition of the work, and seek their advice with reference to its continuance; that thereafter the said receiver by its counsel addressed a letter to all of the creditors, including the claimants, and each of them, herein-above named, setting forth the condition of the work, both with reference to the work done and the work to be completed; moneys already paid out and moneys to be paid, and asking their advice and consent concerning the completion of the work by said receiver; that thereafter, the plaintiffs herein above in this plea named, and each of them, replied to said letter, and did advise and consent to the completion of said work by the said receiver of the Schott Engineering Company. That the said advice and consents by the said plaintiffs, and each of them, was called to the attention of the judge of said court, and the

said court, on February 8th, 1910, entered an order, by which the said receiver of the said Schott Engineering Company was authorized and directed to complete the said work.

Defendant further avers that thereafter the said plaintiffs, and each of them, sold and delivered, furnished and supplied divers and sundry quantities of material, and furnished labor to the said receiver of said bankrupt, in and about the completion of the said work, and were paid for the same by the said receiver out of funds derived from the performance of the said work.

Defendant further says that thereafter the said plaintiffs herein-above in this plea named, and each of them, did file with the Referee in Bankruptcy, in the bankruptcy proceedings of the said Schott Engineering Company, claims that were sworn to, in and by each of which said several claims, the said claimants herein above mentioned, and each of them,

did aver upon oath that they and each of them furnished the labor and material sought to be recovered for in this suit to said Schott Engineering Company, and that the said Schott Engineering Company was and still is justly and truly indebted to the said claimants, and each of them, for the same labor and material sought to be recovered for in this suit.

Defendant further avers that by reason of the premises, the said plaintiffs, and each of them, are estopped from asserting their said claims against this defendant. Wherefore, it, the said defendant, prays judgment if the said claimants, and each of them, ought to be admitted against their aforesaid dealings and actions, to have or maintain their said suit against this defendant, etc.

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant, Illinois Surety Company.

(Endorsed) Filed May 22, 1912, T. C. MacMillan, Clerk.

Plea of Illinois
Surety Co.
amended
Declaration, filed
May 22, 1912

101 And on to-wit: the twenty-seventh day of May, 1912, come the plaintiff in said entitled cause by its attorney and filed in the Clerk's office of said Court, its certain Demurrer to the pleas of Illinois Surety Company. Said Demurrer is in the words and figures following to-wit

Demurrer to
Pleas of Illi-
nois Surety
Co., filed May
17, 1912.

102 DEMURRER TO PLEAS OF ILLINOIS SURETY COMPANY.

IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division.

United States of America, for use and benefit of James B. Clow & Sons, a corporation, <i>et al.</i> ,	} Debt No. 30486
<i>Plaintiff,</i>	
<i>vs.</i>	
Illinois Surety Co., a corporation, and W. H. Schott,	} Defendants.
<i>Defendants.</i>	

And the plaintiff as to the pleas of the defendant, Illinois Surety Company, numbered 2, 3, 4, 5, 6, 7, 8 and 9, says that said pleas and each of them, and the matters and things therein contained in manner and form as the same are in said pleas set forth are not sufficient in law to bar the plaintiff or any of the plaintiffs from having the aforesaid action and that the plaintiff is not bound by law to answer the same.

And for special causes of demurrer, the plaintiff says:

1. That said pleas, numbered 2, 3, 4, 5, 6 and 7, and each of them, amount to the general issue only.

2. That said plea numbered 3, states only conclusions of law, and is indefinite, insufficient and uncertain in that the same does not allege facts upon which it can be determined whether plaintiffs have been damaged of their own wrong, as claimed in said plea,

3. That said plea numbered six and the allegations therein that the plaintiffs or any or either of them did not furnish and supply labor and material or either of them to the said contractor Schott, in the prosecution of the said work as alleged in said plea, is insufficient and immaterial and notwithstanding said matter alleged in said plea such labor and material or either may have been supplied to subcontractors or other persons under the said Schott as alleged in said declaration

4. That the allegations contained in said plea numbered 7, as to assignment of said contract by said contractor, Schott, to the Schott Engineering Company, and

the carrying out of the work by said Engineering Company and the furnishing of materials and labor or either to the said Engineering Company as alleged in said plea are insufficient and immaterial matters as regards right of recovery on said bond declared upon in said declaration, and in no wise vary or obviate the obligations of the defendant on said bond.

5. That the allegations in said pleas numbered 8 and 9 and each of them as regards assignment of said contract to the Schott Engineering Company, the bankruptcy of said Engineering Company and other matters and things set forth in said pleas and each of them are immaterial and insufficient to bar recovery on behalf of the plaintiffs named in said pleas 8 and 9 respectively, and in no manner release the defendant, Surety Company, from its obligations under said bond sued upon, nor in any manner estop the plaintiffs or any of them.

And this the plaintiff is ready to verify, wherefore as to said pleas and each of them the plaintiff prays judgment, etc., and its damages, etc.

WYETH & SMITH, KNAPP & CAMPBELL,
RALPH E. CHURCH,

Attorneys for Plff.

104 United States of America
Northern District of Illinois
State of Illinois
County of Cook } ss.

Newton Wyeth being duly sworn on his oath deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause and that he has read the foregoing demurrer to the pleas number 2 to 9 inclusive and each of said pleas of the defendant, Illinois Surety Company, and that said demurrer is not interposed for the purpose of delay, but that justice may be done.

And said Newton Wyeth further certifies that in his opinion the foregoing demurrer of the plaintiff is well founded in law and proper to be filed in the above entitled cause.

NEWTON WYETH.

Subscribed and sworn to before me this 27 day of May, A. D. 1912.

(Seal) RUPERT J. BARRY,
Notary Public.

(Endorsed) Filed May 27, 1912, T. C. MacMillan, Clerk.

Demurrer to
pleas of Il-
nois Surety
Co., filed May
27, 1912.

er of June
9, 1912.

105 And on to-wit: the twentieth day of June, 1912, in the record of proceedings thereof in said entitled cause, before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

United States of America for use etc.	} 30486.
<i>vs.</i>	
Illinois Surety Company, <i>et al.</i>	

Now come the parties by their attorneys, upon motion, leave is hereby granted the defendant, W. H. Schott, to file additional pleas by July 10th next, and this cause is set for hearing on July 22nd, 1912.

as of W. H.
Schott to
amended dec-
laration, filed
July 10, 1912.

106 And on to-wit: the tenth day of July, 1912, come W. H. Schott by his attorney and filed in the Clerk's office of said Court his certain Pleas to the Amended Declaration. Said Pleas are in words and figures following to-wit:

107 PLEAS OF DEFENDANT W. H. SCHOTT TO THE AMENDED DECLARATION.

IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division,
October Term, A. D. 1911.

United States of America, for the use and benefit of James B. Clow & Sons, a Corporation, <i>et al.</i>	} Gen. No. 30486.
<i>Plaintiffs,</i>	
<i>vs.</i>	
Illinois Surety Company, a Corpora- tion, and W. H. Schott,	
<i>Defendants.</i>	

Pleas of Defendant, W. H. Schott to the Amended Declaration.
1. And W. H. Schott, one of the above named defendants, by W. N. Horner his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said

sum of money above demanded by the said plaintiffs or either of them or any part thereof, in manner and form, as plaintiffs and each of them have above complained against him, and of this the said defendant puts himself upon the country, etc.

2. And for further plea in this behalf the said defendant W. H. Schott, by his said attorney, comes and defends the wrong and injury, when, etc., and says that the said plaintiffs or any of them ought not to have or maintain their aforesaid action against him, this defendant, because he says that the said plaintiffs nor any or either of them have not at any time since the making of the said writing obligatory, and conditions thereof, been in any wise damnified by reason of any matter or thing in the said conditions mentioned, and this this defendant is ready to verify; therefore, he prays judgment of the plaintiffs or any or either of them ought to have or maintain their aforesaid action against him, etc.

3. And for further plea in this behalf the said defendant W. H. Schott, by his said attorney, comes and says that if the said plaintiffs or any or either of them have been damnified for or by reason or means or on account of any matter, cause or thing in said declaration mentioned, the said plaintiffs and each of them have been damnified of their own wrong and by and through their and each of their own means or default, and this he is ready to verify; wherefore, he, the said defendant prays judgment if the said plaintiffs or either of them ought to have or maintain their aforesaid action against him, etc.

4. And for further plea in this behalf the said defendant W. H. Schott, by his attorney, comes and defends, etc., and says that the said plaintiffs or any or either of them ought not to have or maintain their aforesaid action against him the said defendant, because he, the said defendant says that the said plaintiffs or any or either of them did not furnish and supply labor and material or either of the same to the said defendant in the prosecution of the said work provided in the said contract, and of this the defendant puts himself upon the country, etc.

5. And for further plea in this behalf as to labor and materials claimed by said plaintiffs and each of them to have been furnished and supplied prior to January 2d, A. D. 1909, on and for the said work mentioned in said declaration, the said defendant W. H. Schott, by his attorney, comes and defends, and says that the said plaintiffs or any or either of them

Pleas of W.
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Schott to
Amended dec-
laration, filed
July 10, 1912.

ought not to have or maintain their aforesaid action
109 against him the said defendant for such labor and ma-
terial furnished prior to the said date, because the said
defendant says that the said plaintiffs and any and all of
them have been paid in full for such labor and materials fur-
nished prior to said date, and of this the defendant puts him-
self upon the country, etc.

6. And for further plea in this behalf as to the labor and
material claimed by said plaintiffs and each of them to have
been furnished and supplied after January 2d, 1909, on and
for said work mentioned in said declaration, the said defend-
ant W. H. Schott, by his attorney, comes and defends, etc., and
says that the said plaintiffs or any or either of them ought not
to have or maintain their aforesaid action against him the said
defendant for such labor and material furnished after said
date, because this said defendant says that on January 2d,
A. D. 1909, this said defendant offered in writing to the Schott
Engineering Company, a Corporation, for a valuable consid-
eration to sell, assign, transfer and set-over to the said Schott
Engineering Company, all right, title and ownership in and
to the said contract made and entered into between the said
Schott and the United States Government mentioned and de-
scribed in the declaration herein, but the said proposition
was based upon its prompt acceptance and the taking over
by the Schott Engineering Company of the said contract men-
tioned in the said declaration as of January 1st, 1909, and the
assuming by the said Schott Engineering Company of all re-
sponsibility in the matter of the said contract and the re-
lieving of said Schott of any and all liability pertaining there-
to; that thereafter, the board of directors of the said Schott
Engineering Company, at a meeting duly held January 2d,
1909, adopted a resolution by a unanimous vote, in and by
which resolution the said Corporation accepted the said pro-
posal and offer of this said defendant, and this said de-
110 fendant did then and there sell, assign, transfer and set-
over unto the said Schott Engineering Company, all right,
title and interest in and to the said contract, and the said
Schott Engineering Company did then and there, and there-
after, do all the work and but all the material and hire all the
labor in the performance of said contract described in said
declaration; that this said defendant had nothing further to
do with the work required to be done by or in the perform-
ance of the said contract; that the said plaintiffs, by a cred-

itor's committee duly appointed by the said plaintiffs prior to January 2d, A. D. 1909, consented to and advised the said assignment by this said defendant W. B. Schott to the Schott Engineering Company; that the said plaintiff in consideration of the above mentioned assignment to the said Schott Engineering Company, then and there agreed to relieve the said defendant W. H. Schott of all liability for materials furnished and hire and labor furnished in the performance of said contract described in said declaration. This defendant further says that said plaintiffs and any and all of them have been paid in full for all materials furnished and all work and labor done in the performance of said contract described in said declaration prior to January 2d, A. D. 1909, the date of the assignment of the said contract mentioned in said declaration to the Schott Engineering Company; This defendant further avers that as to so much of the said declaration as assigns breaches on the liability of this defendant to pay for labor and material that was furnished and supplied upon the said work after January 2d, A. D. 1909, this defendant says that all of such labor and material were sold furnished and supplied by the said plaintiffs and each of them to the said Schott Engineering Company, a Corporation, and this this defendant is ready to verify; wherefore, he prays judgment if the said plaintiffs or any or either of them ought to have or maintain their aforesaid action against him, this defendant as to the alleged breaches for labor and material supplied the
111 said Schott Engineering Company as aforesaid, after January 2d, A. D. 1909, etc.

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Schott to
amended de-
claration, fil.
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7. And for further plea in this behalf as to the claims of the said plaintiffs, to-wit: Stebbins Hardware Company, Universal Portland Cement Company, Featherstone Foundry & Machine Company, Davies Supply Company, Schott Valve Company, Western Roofing & Supply Company, Electric Appliance Company, H. W. John-Manville Company, Standard Underground Company, John Davis Company, D. E. Garrison, Jr., doing business, etc., James P. March & Company, Raymond Lead Company, Roebling Construction Company, Western Kiely Steam Specialty Company, Racine Stone Company, George B. Carpenter and Charles A. Daniel, trading as Quaker City Rubber Company, the said defendant W. H. Schott, by his attorney, comes and defends, etc., and says that the said mentioned plaintiffs are, and each of them is estopped and ought not to be permitted or heard to maintain their aforesaid

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action against this defendant because he, this defendant says that on January 2d, A. D. 1909, the said contractor W. H. Schott, offered in writing to the said Schott Engineering Company, a Corporation, for a valuable consideration, to sell, assign, transfer and set-over to the said Schott Engineering Company, all right, title and ownership in and to the said contract made and entered into between the said Schott and the United States Government mentioned and described in the declaration herein; that said proposition was based upon its prompt acceptance and the taking over by the Schott Engineering Company of the said contract mentioned in the said declaration as of January 1st, 1909, and the assuming by the said Schott Engineering Company, of all responsibility in the matter of said contract, and the relieving of said defendant of any and all liability pertaining thereto; that thereafter, the board of directors of the said Schott Engineering Company, at a meeting duly held January 2d, A. D. 1909, adopted a 112 resolution by a unanimous vote in and by which resolution the said Corporation accepted the said proposal and offered this said defendant, and this said defendant did then and there sell, assign, transfer and set-over unto the said Schott Engineering Company, all right, title and interest in and to the said contract, and the said Schott Engineering Company did then and there and thereafter, do all the work and buy all the material and hire all the labor in the performance of said work described in said declaration; that this said defendant had nothing further to do with the work required to be done by or the performance of the said contract. This defendant further avers that thereafter, on or about January 27th, A. D. 1910, the Schott Engineering Company was adjudged a bankrupt in the District Court of the United States, for the Northern District of Illinois, and that thereafter, the said claimants in this plea above named filed with the Referee in Bankruptcy of the bankruptcy proceedings of the said Schott Engineering Company, claims that were sworn to in and by which said several claims the said claimants hereinabove mentioned and each of them, did aver upon oath that they and each of them furnished the labor and material sought to be recovered for in this suit to said Schott Engineering Company, and that said Schott Engineering Company was and still is justly and truly indebted to the said claimants and each of them for the same labor and material sought to be recovered for in this suit. This defendant further avers that

any reason of the premises, the said claimants and each of them, are estopped from maintaining their said claim against this defendant; wherefore, this said defendant prays judgment if the said claimants and each of them ought to be admitted against their aforesaid dealings and actions to have or maintain their said suit against this defendant.

8. And for further plea in this behalf as to claims of the said plaintiffs, to-wit: Stebbins Hardware Company, Universal Portland Cement Company, Featherstone Foundry & Machine Company, Davies Supply Company, Scott Valve Company, Western Roofing & Supply Company, Electric Appliance Company, R. W. John-Manville Company, Standard Underground Company, John Davis Company, D. C. Garrison, Jr., doing business, etc., James P. Marsh & Company, Raymond Lead Company, Roebling Construction Company, Western Kiely Steam Specialty Company, Racine Stone Company, George B. Carpenter and Charles A. Daniel, trading as Quaker City Rubber Company, the said defendant W. H. Schott, by his attorney, comes and defends, etc., and says that the said mentioned plaintiffs are and each of them is estopped and ought not to be permitted or heard to maintain their aforesaid action against this defendant, because he, the said defendant, says that on January 2d, A. D. 1909, this said defendant W. H. Schott offered in writing to the Schott Engineering Company, a Corporation, to sell, assign, transfer and set over to the said Schott Engineering Company, all right, title and ownership in and to the said contract made and entered into between this said defendant and the United States Government, mentioned and described in the declaration herein; that the said proposition was based upon its prompt acceptance and the taking over by the said Schott Engineering Company of the said contract mentioned in the said declaration as of January 1st, A. D. 1909, and the assuming by the said Schott Engineering Company, of all responsibility in the matter of the said contract and the relieving of this said defendant of any and all liability pertaining thereto; that thereafter, the board of directors of the Schott Engineering Company, at a meeting duly held January 2d, A. D. 1909, adopted a resolution by a unanimous vote in and by which resolution the said Corporation accepted the said proposal and offer of this said defendant, and this said defendant did then and there sell, assign, transfer and set-over unto the said Schott Engineering Company, all right title and interest in and to the said

Pleas of W. H. Schott to amended declaration, filed July 10, 1909

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contract, and the said Schott Engineering Company did
114 then and there, and thereafter, do all the work, buy all
material and hire all labor in the performance of said
work described in said declaration; that this said defendant
had nothing further to do with the work required to be done
by said contract or the performance of the same. This de-
fendant further avers that the said assignment of said contract
and the taking over of the same by the said Schott Engineering
Company was done by and with the consent and knowledge of
the said plaintiffs by and through a creditors' committee ap-
pointed by the said plaintiffs to take charge of the affairs of
this said defendant, and that in consideration of the assign-
ment by this defendant of the above mentioned contract by
and between W. H. Schott and the United States Government
to the Schott Engineering Company, the said plaintiffs and
every and each of them, did relieve the said Schott of any and
all obligation for materials furnished and work and labor done
in the performance of said work described in said declara-
tion. Defendant further avers that on or about the 14th day
of January, A. D. 1910, a petition of involuntary bankruptcy
was filed against the said Schott Engineering Company, a cor-
poration as aforesaid, and The Central Trust Company of
Illinois, a corporation organized under the laws of the State
of Illinois, was appointed receiver of the estate of the said
Schott Engineering Company by an order of the District
Court of the United States of the Northern District of Illi-
nois, Eastern Division, and that immediately upon its ap-
pointment as such receiver, it took possession of the property
and assets of the said bankrupt.

Defendant further avers that thereafter, on or about Jan-
uary 27th, A. D. 1910, the said Schott Engineering Company
was by an order entered in the said District Court of the
United States for the Northern District of Illinois, adjudged a
bankrupt; that thereafter, on to-wit, January 31st, 1910, said

115 receiver of the said bankrupt, The Central Trust Company
of Illinois, filed its petition in the said District Court of
the United States, representing to the court that this said
defendant had entered into the said contract described in the
declaration with the United States Government, and further,
represented to the court that early in the month of January,
A. D. 1909, this said defendant sold, assigned and transferred
to the said Schott Engineering Company, the above-named
bankrupt, all right, title and interest in and to the aforesaid

contract with the United States Government; and further represented to the court that since the organization of the Schott Engineering Company, on or about January 2d, A. D. 1909, all of the work under said contract was performed by the Schott Engineering Company, the said bankrupt, and at the time that the said receiver was appointed, the said Schott Engineering Company was engaged upon the work, and prayed instructions of the court as to whether or not the said receiver should continue with said work and complete the same.

Defendant further avers that said court upon said petition, entered an order that the said receiver should continue with the work in hand until February 8th, 1910, and that the receiver should notify the creditors by letter, of the condition of the work, and seek their advice with reference to its continuance; that thereafter the said receiver by its counsel addressed a letter to all of the creditors, including the claimants, and each of them, herein-above named, setting forth the condition of the work, both with reference to the work done and the work to be completed; moneys already paid out and moneys to be paid, and asking their advice and consent concerning the completion of the work by said receiver; that thereafter, the plaintiffs hereinabove in this plea named, and each of them, replied to said letter, and did advise and con-

sent to the completion of said work by the said receiver of 116 the Schott Engineering Company. That the said advices and consents by the said plaintiffs, and each of them, was called to the attention of the judge of said court, and the said court, on February 8th, A. D. 1910, entered an order by which the said receiver of the said Schott Engineering Company was authorized and directed to complete the said work.

Defendant further avers that thereafter the said plaintiffs, and each of them, sold and delivered, furnished and supplied divers and sundry quantities of material, and furnished labor to the said receiver of said bankrupt, in and about the completion of the said work, and were paid for the same by the said receiver out of funds derived from the performance of the said work.

Defendant further avers that thereafter the said plaintiffs hereinabove in this plea named, and each of them, did file with the Referee in Bankruptcy, in the bankruptcy proceedings of the said Schott Engineering Company, claims that were sworn to, in and by each of which said several claims, the said claim-

Pleas of W.
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Case of W. H. Schott to Amended Declaration, filed July 10, 1912.

ants hereinabove mentioned, and each of them, did aver upon oath that they and each of them furnished the labor and material sought to be recovered for in this suit to said Schott Engineering Company, and that the said Schott Engineering Company was and still is justly and truly indebted to the said claimants and each of them, for the same labor and material sought to be recovered for in this suit.

Defendant further avers that by reason of the premises, the said plaintiffs and each of them, are estopped from asserting their said claims against this defendant; wherefore, he, this said defendant, prays judgment if the said claimants, and each of them, ought to be admitted against their aforesaid dealings and actions, to have or maintain their said suit against this defendant, etc.

117 9. And for a further plea in this behalf as to the claims of the Western Roofing & Supply Company, a Corporation, the Roebbling Construction Company, a Corporation, F. Bairstow, Universal Portland Cement Company, a Corporation, John Davis Company, a Corporation, Standard Underground Cable Company, a Corporation, H. Channon Company, a Corporation, H. W. Johns-Manville Company, a Corporation, G. B. Watrous Sons, Electric Appliance Company, a Corporation and Maloney Electric Company, a Corporation, the said defendant W. H. Schott, by his attorney, comes and defends, etc., and says that the said mentioned plaintiffs are, and each of them is, estopped and ought not to be permitted or heard to maintain their aforesaid action against the said defendant because the said defendant says that on, to-wit: the 21st day of March, A. D. 1910, the said defendant was adjudicated a bankrupt in the District Court of the United States, for the Northern District of Illinois, and that thereafter the said claimants in this plea above named filed with the Referee in Bankruptcy in the bankruptcy proceedings of this said defendant, claims that were sworn to, in and by which several claims the said claimants hereinabove mentioned and each of them did aver upon oath that they and each of them, furnished the labor and material sought to be recovered for in this suit to the said defendant, and that the said defendant was and still is justly and truly indebted to the said claimants and each of them for the same labor and material sought to be recovered for in this suit. Defendant further avers that this defendant was duly discharged as a bankrupt from all claims, and especially, from the claims of the claimants hereinabove

mentioned in this plea, on the 3d day of October, A. D. 1910. This defendant further avers that by reason of the premises the said claimants are and each of them is estopped from maintaining their said claims against this defendant; wherefore he, this said defendant, prays judgment, if the said 118 claimants and each of them ought to be admitted against their aforesaid dealings and actions, to have or maintain this their said suit against this defendant.

W. H. SCHOTT,
Defendant.

(Endorsed) Filed July 10, 1912, T. C. MacMillan, Clerk.

Pleas of W.
Schott to
amended de-
claration, filed
July 10, 1912.

119 And on to-wit: the nineteenth day of July, 1912, come the plaintiff in said entitled cause by its attorney and filed in the clerk's office of said Court its certain Demurrer to the Pleas of the defendant, W. H. Schott, Said Demurrer is in words and figures following to-wit:

Demurrer to
pleas of W.
H. Schott,
filed July 10,
1912.

120 DEMURRER TO PLEAS OF W. H. SCHOTT.

IN THE DISTRICT COURT OF UNITED STATES

Northern District of Illinois

Eastern Division.

United States of America, for use and benefit of James B. Clow & Sons, a corporation, <i>et al.</i>	}	Debt. No. 30486.
<i>vs.</i>		
Illinois Surety Company, a corpora- tion, and W. H. Schott		

And the plaintiff as to the pleas of the Defendant, W. H. Schott, No. 2, 3, 4, 5, 6, 7, 8 and 9, says that said pleas and each of them, and the matters and things therein contained in manner and form as the same are in said pleas set forth are not sufficient in law to bar the plaintiff from having the aforesaid action and that the plaintiff is not bound in law to answer the same.

And for special causes of demurrer, the plaintiff says:

1. That said pleas No. 2, 3, 4, 5, and 6 and each of them amount to the general issue only.

demurrer to
pleas of W.
H. Schott,
filed July 19,
1912.

2. That said plea numbered 3 is improper and not applicable as a defence to the cause of action set forth in the said declaration, and states only conclusions of law, and is indefinite and uncertain in that the same does not allege facts upon which it can be determined whether plaintiffs have been damaged of their own wrong as alleged in said plea.

3. That said plea numbered 4 and the allegations therein, that the plaintiffs or any of them did not furnish and supply labor or material or either of them to the said defendant, Schott in the prosecution of the said work as alleged in said plea, are insufficient and immaterial, and notwithstanding said matters alleged in said plea, such labor and material and either of them may have been supplied to sub-contractors or other persons under the said defendant as alleged in said declaration.

4. That said plea numbered 5 is insufficient, indefinite and uncertain in that the same does not allege any time of payment or how payment was made, as alleged in said plea.

5. That the allegations contained in said plea numbered 6 as to assignment of said contract by said defendant, Schott, to the Schott Engineering Co., and the carrying out of the work by said Engineering Company, and the furnishing of materials and labor, or either, to the said Engineering Company and that the plaintiffs consented to and advised the said assignment, and that the plaintiffs in consideration thereof agreed to relieve the said defendant, Schott of all liability for materials furnished and hire and labor furnished, and that plaintiffs have been paid in full for all materials furnished prior to January 2nd, 1909, as alleged in said plea, are insufficient and immaterial matters as regards right of recovery on said bond declared upon in said declaration and in no wise vary or obviate or satisfy the obligations of said defendant on said bond.

6. That the allegations in said pleas numbered 7 and 8 and each of them as regards assignment of said contract to the Schott Engineering Company, the bankruptcy of said Engineering Company, and other matters and things set forth in said pleas and each of them, and that as alleged in said plea numbered 8 that the said assignment of said contract was made by and with the consent and knowledge of the plaintiffs and that in consideration thereof, the plaintiffs and each of them did relieve the said defendants, Schott, of any and a

Demurrer to
pleas of V.
H. Schott, file
filed July 19
1912.

obligations for materials furnished and work and labor done in the performance of the said work described in the said declaration, are immaterial and insufficient to bar recovery on behalf of the plaintiffs named in said pleas seven and eight respectively, and in no manner release the defendant, Schott from his obligations under said bond sued upon, nor in any manner estop the plaintiffs or any of them.

And this the plaintiff is ready to verify, wherefore as to said pleas numbered 2, 3, 4, 5, 6, 7, 8 and 9, and each of them, the plaintiff prays judgment, etc., and its damages, etc.

WYETH & SMITH, KNAPP & CAMPBELL,
RALPH E. CHURCH & HOLT, WHEELER &
SIDLEY,

Attorneys for Plaintiff.

122 I, Newton Wyeth, one of the attorneys for the plaintiff in the above entitled cause do hereby certify that I have examined the foregoing demurrer of the plaintiff to the pleas numbered two to nine both inclusive, of the defendant, W. H. Schott, and that in my opinion the said demurrer is well founded in law and proper to be filed in the above entitled cause.

NEWTON WYETH,
One of the Attorneys for the Plaintiff.

United States of America
Northern District of Illinois
State of Illinois
County of Cook. } ss.

Newton Wyeth being duly sworn on his oath deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause, and that he has read the foregoing demurrer to the pleas numbered two to nine, both inclusive, of the defendant, W. H. Schott, in said cause and affiant says that the said demurrer is not interposed for the purpose of delaying said suit or any proceedings therein, or of the defendants thereto, but that justice may be done.

NEWTON WYETH.

Subscribed and sworn to before me this 18th day of July, A. D. 1912.

RUPERT J. BARRY,
Notary Public.

(Seal)

(Endorsed) Filed July 19, 1912, T. C. MacMillan, Clerk.

er of July
1, 1912.

123 And on to-wit: the twenty-second day of July, 1912, in the record of proceedings thereof, in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

United States of America for use etc.	} 30486.
vs.	
Illinois Surety Company, <i>et al.</i>	

Now come the parties by their attorneys and now comes on to be heard the demurrers of the plaintiff to the plea of the defendant Illinois Surety Company. After hearing the arguments of counsel, the Court being fully advised.

It is Ordered that said demurrers as to pleas numbered 4 and 5 of the Illinois Surety Company be and the same are hereby sustained, and thereupon said Illinois Surety Company elects to stand by said pleas.

It is further ordered that the plaintiff's demurrers to pleas numbered 2, 3, 6, 7, 8 and 9 of said Illinois Surety Company be and the same are hereby overruled with leave to the plaintiff to reply in thirty days, and to reply double if so advised, said Illinois Surety Company to plead or demur as it may elect in thirty days thereafter. And the Court having heard arguments and being now fully advised,

It is further ordered that the plaintiff's demurrers to pleas numbered 2, 3, 4, 5, 6, 7, and 8 of W. H. Schott be and the same are hereby overruled with leave to the plaintiff to reply in thirty days, and to reply double if so advised, said W. H. Schott to plead or demur if he may elect in thirty days thereafter.

And now comes on to be heard the demurrers of the plaintiff to the plea of W. H. Schott filed October 24th, 1911, and plea numbered 9 filed by said W. H. Schott. After hearing the arguments of counsel to conclusion the Court takes the matter under advisement.

124 And on to-wit: the fourteenth day of November, 1912, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

125

Thursday, November 14, 1912.

Order of Nov
14, 1912.

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

Present. Hon. A. L. Sanborn, District Judge.

United States for use of James B.	} No. 30,486.
Clow & Sons, <i>et al.</i> ,	
<i>vs.</i>	
Illinois Surety Company and W. H. Schott.	

Now, on this 14th day of November, A. D. 1912, coming on to be heard the motion heretofore made by the plaintiffs herein, and each of them, to vacate and set aside that part of the orders heretofore entered by this Court, overruling the demurrers of plaintiffs herein to the pleas heretofore filed by the Illinois Surety Company, and said motion is overruled as to pleas numbered respectively 1, 2 and 3, and each of them, heretofore filed by the said defendant, Illinois Surety Company, and it is hereby ordered that the demurrer to said pleas numbered 1, 2 and 3, and each of them, be, and the same is hereby overruled.

And it is further ordered by the Court that the order heretofore entered, overruling the demurrer of said plaintiffs, and each of them, to pleas numbered 7, 8 and 9 respectively, of said Illinois Surety Company, be, and the same is, hereby set aside and vacated, and the demurrer of said plaintiffs, and each of them, be and is hereby sustained to said pleas numbered 7, 8 and 9, and each of them, heretofore filed by said Illinois Surety Company, to which ruling and order of the Court said defendant, Illinois Surety Company, excepts, and it does hereby elect to stand by its said pleas numbered 7, 8 and 9, each of the same; and leave be and is hereby granted to said defendant, Illinois Surety Company, to file its additional special plea numbered 10, which shall be by the Clerk marked "filed" as of this day, November 14, 1912.

And, on motion of said plaintiffs, and each of them, it is ordered that their demurrer heretofore filed shall stand to said plea numbered 10 of said Illinois Surety Company.

Order of Nov.
14, 1912.

And it is further ordered that said demurrer of said plaintiffs, and each of them, to said plea numbered 10 of said Illinois Surety Company be and the same is hereby sustained, to which action of the Court in sustaining said demurrer said Illinois Surety Company duly excepts and does hereby elect to stand by its said plea numbered 10, as aforesaid.

Additional plea
of Illinois
Surety Co.,
filed Nov. 14,
1912.

127 And on to-wit: the fourteenth day of November, 1912, come Illinois Surety Company by its attorney and filed in the Clerk's office of said Court its certain Additional Plea in words and figures following to-wit:

128 ADDITIONAL PLEA OF ILLINOIS SURETY
COMPANY.

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

October Term, A. D. 1912.

United States of America, for the use
and benefit of James B. Clow &
Sons, a corporation, *et al.*,

Plaintiffs,

vs.

Illinois Surety Company, a corpora-
tion, and W. H. Schott,

Defendants.

Gen. No. 30486.

Additional Plea of the Defendant, Illinois Surety Company,
Filed by Leave of Court First Had and Obtained.

No. 10.

And for a further plea in this behalf, the said defendant, Illinois Surety Company, by its said attorneys, comes and defends etc., and says that the said plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action

Additional plea
of Illinois
Surety Co.
filed Nov.
1912.

against it, the said defendant, because it says that on January 2, A. D. 1909, the said contractor, W. H. Schott, offered in writing to the Schott Engineering Company, a corporation, to sell, assigns, transfer and set-over, to said Schott Engineering

Company, all right, title and ownership in and to the said 129 contract, made and entered into between the said W. H.

Schott and the United States of America, mentioned and described in the declaration herein; that in the said proposition it was stated that it was based upon its prompt acceptance and the taking over by the said Schott Engineering Company of the said contract mentioned in the said declaration, as of January 1, 1909, and the assuming by said Schott Engineering Company of all responsibility and liability in the matter of the said contract, and the relieving of said Schott of any and all liability with reference thereto, and further provided that the Schott Engineering Company should collect and have for its own use all moneys due and becoming due under said contract.

Defendant further avers that thereafter the Board of Directors of the said Schott Engineering Company, at a meeting duly called and held on January 2, 1909, adopted a resolution by a unanimous vote, in and by which said resolution the said corporation then and there accepted the said proposal and offer of the said W. H. Schott, aforesaid, to sell, assign, transfer and set-over said contract, as aforesaid, and the said W. H. Schott did then and there sell, assign, transfer and set-over unto the said Schott Engineering Company, all right, title and interest in and to the said contract, and the said Schott Engineering Company did then and there accept the same and agreed to assume all responsibility and liability in the matter of said contract and to relieve said Schott of any and all liability with reference thereto, and did enter in and upon the said works, mentioned in the said contract and declaration, and did then and there and thereafter do all of the work and furnish all the material in the performance thereof, and that the said W. H. Schott, individually, had nothing further to do with the said work or the performance of the said contracts; all of which proceedings were without the knowledge or consent of this defendant.

Defendant further avers that on or about the 14th day of January, 1910, and while the said Schott Engineering Company was engaged in the performance of the said contract mentioned in the declaration, a petition of involuntary 130 bankruptcy was filed against the said Schott Engineering

Additional plea
of Illinois
Surety Co.,
filed Nov. 14,
1912.

Company, a corporation as aforesaid, and the Central Trust Company of Illinois, a corporation organized under the Laws of the State of Illinois, was appointed receiver of the estate and assets of the said Schott Engineering Company by an order of the District Court of United States for the Northern District of Illinois, Eastern Division, and that immediately upon its appointment as such receiver it took possession of the property and assets of said bankrupt.

Defendant further avers that thereafter, on or about January 27, 1910, the said Schott Engineering Company was, by an order entered in the said District Court of United States for the Northern District of Illinois, adjudged a bankrupt; that thereafter, on to-wit: January 31, 1910, said receiver of said bankrupt, the Central Trust Company of Illinois, filed its petition in the said District Court of United States, representing to the court that said W. H. Schott had theretofore entered into the said contract described in the declaration, with the United States Government, and further represented to the court that early in the month of January, 1909, the said Schott sold, assigned, transferred and set-over to the said Schott Engineering Company, the above-named bankrupt, all right, title and interest in and to the aforesaid contract, and further represented to the court that since the organization of the Schott Engineering Company all of the work under said contract was performed and material furnished by the said Schott Engineering Company, and that at the time the said receiver was appointed, the said Schott Engineering Company was engaged upon the completion of said contract, and prayed the instruction of the court as to whether or not the said receiver should continue with the said work and complete the same.

Defendant further avers that said court upon said petition thereupon entered an order that the said receiver should

131 continue with the work in hand on said contract, until

February 8, 1910, and that the said receiver should notify the creditors who had furnished labor and material on said work by letter of the condition of the work, and seek their advice with reference to its continuance, and that thereafter the said receiver addressed and forwarded a letter to all of said creditors, including the plaintiffs, and each of them, in this suit, in which it was stated that the said contract in January, 1909, had been assigned by said Schott to the Schott Engineering Company; that in consideration of the assignment of said contract, described in the declaration herein, by said Schott to said Schott Engineering Company, the said Com

pany delivered certain shares of its capital stock to said Schott; and that since said date all the work done under said contract had been done by the Schott Engineering Company, and that this defendant claimed that W. H. Schott, individually, was its principal in said bond, and denied having anything in common with the Schott Engineering Company; and setting forth the condition of the work, both with reference to the work done and the work to be completed; moneys already paid out, and moneys to be paid, and moneys due on said contract from the United States Government, and asking their advice and consent concerning the completion of the said works in the declaration mentioned, by the said receiver of the said Schott Engineering Company; that thereafter the plaintiffs in this cause, and each of them, replied to said letter, and did advise and consent to the completion of said work by the receiver of the said Schott Engineering Company; that

the said advice and consents of the said plaintiffs, and each of them, were called to the attention of the Judge of said court, and the said court, on February 8, 1910, entered an order by which the said receiver of the said Schott Engineering Company was authorized and directed to complete the said works, and said receiver did thereafter, pursuant to said order, finish the said contract, all of which was done without the consent of this defendant.

Defendant further avers that thereafter the said plaintiffs, and each of them, in this cause, sold and delivered, furnished and supplied divers and sundry quantities of material, and furnished labor to the said receiver of the said bankrupt, in and about the completion of the said contract, and were paid for the same by said receiver.

Defendant further avers that thereafter the said plaintiffs in this cause, and each of them, did file with the Referee in Bankruptcy in the bankruptcy proceedings of the said Schott Engineering Company, claims that were sworn to, in and by which said several claims the said plaintiffs in this cause, and each of them, did aver upon oath that they, and each of them, furnished the labor and material sought to be recovered for in this suit, to said Schott Engineering Company, and that the said Schott Engineering Company was and still is justly and truly indebted to the said plaintiffs, and each of them, for the same labor and materials sought to be recovered for in this suit, and for the full amount sought to be recovered in this suit by said plaintiffs, and each of them, and defendant avers that all of the foregoing matters and proceedings were had

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of Illinois
Surety Co
filed Nov.
1912.

Additional plea
Illinois
Surety Co.,
Nov. 14,
1912.

without the consent of this defendant, all of which this defendant is ready to verify: Wherefore, it prays judgment if the said plaintiffs, or any or either of them, ought to have their aforesaid action against it, etc.

HOPKINS, PEFFERS & HOPKINS,
Attorneys for Defendant, Illinois Surety Company.

(Endorsed) Filed Nov. 14, 1912, T. C. MacMillan, Clerk.

Additional plea
W. H.
Schott, filed
Nov. 14, 1912.

133 And on the same day to-wit: the fourteenth day of November, 1912, come W. H. Schott, by his attorney and filed in the Clerk's office of said Court his certain Additional Plea in words and figures following to-wit:

134 ADDITIONAL PLEA OF W. H. SCHOTT.

IN THE CIRCUIT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

October Term, A. D. 1212.

United States of America, for the use
and benefit of James B. Clow &
Sons, a corporation, *et al.*,

Plaintiffs,

vs.

Illinois Surety Company, a corporation,
and W. H. Schott,

Defendants.

Gen. No. 30486.

Additional Plea of the Defendant, W. H. Schott, Filed by
Leave of Court First Had and Obtained.

No. 10.

And for a further plea in this behalf, the said defendant, W. H. Schott, by his said attorneys, comes and defends, etc., and says that the said plaintiffs, or any or either of them, ought not to have or maintain their aforesaid action against him, the said defendant, because he says that on January 2,

A. D. 1909, he, the said defendant, offered in writing to the Schott Engineering Company, a corporation, to sell, assign, transfer and set over to said Schott Engineering Company all right, title and ownership in and to said contract made and entered into between this said defendant and United States of America, metioned and described in the declaration herein; that in the said proposition it was stated that it was based upon its prompt acceptance and the taking over by the 135 said Schott Engineering Company of the contract mentioned in said declaration, as of January 1, 1909, and the assuming by the said Schott Engineering Company of all responsibility and liability in the matter of said contract, and the relieving of this said defendant of any and all liability with reference thereto, and provided further that the said Schott Engineering Company should collect and have for its own use all moneys due and becoming due under said contract, and should have all rights and benefits accruing thereunder.

Defendant further avers that a creditors' committee, representing all of the creditors of this defendant at the time of the above mentioned assignment to the said Schott Engineering Company had charge of this defendant's affairs and that the said assignment and transfer mentioned above to the said Schott Engineering Company was done by and with the consent, advice and approval of the said creditors' committee, and that each and every one of the plaintiffs in this suit were represented by said creditors' committee.

Defendant further avers that in consideration of the above mentioned assignment by this said defendant to the said Schott Engineering Company, the plaintiffs in this action, by their creditors' committee, agreed to relieve this said defendant from all liability and responsibility whatever arising under the contract mentioned and described in the declaration herein, and thereby and thereupon agreed to look to the said Schott Engineering Company for the payment of their claims arising under said contract, mentioned and described in the declaration herein, which said claims are the same claims that are set out in the declaration herein, and are the same claims on which the plaintiffs base this present action.

136 Defendant further avers that thereafter the Board of Directors of the said Schott Engineering Company, at a meeting duly called and held on January 2, 1909, adopted a resolution by a unanimous vote, in and by which said resolution the said corporation then and there accepted the said proposal and offer of this said defendant to sell, assign, trans-

Additional pl
of W. H.
Schott, file
Nov. 14, 19

Additional plea
of W. H.
Schott, filed
Nov. 14, 1912.

fer and set over said contract as aforesaid, and this said defendant did then and there sell, assign, transfer and set over unto the said Schott Engineering Company all right, title and interest in and to the said contract, and the said Schott Engineering Company did then and there accept the same and agree to assume all responsibility and liability in the matter of said contract and to relieve this said defendant of any and all liability with reference thereto, and did enter upon the said works mentioned in the said contract and declaration and did then and there and thereafter do all of the work and furnish all the material in the performance thereof, and that the same was done by and with the advice, consent and approval of the said creditors' committee of this said defendant, which said creditors' committee represent the plaintiffs herein; and this defendant further states that he had nothing further to do with the said work or the performance of said contract.

Defendant further avers that on the 14th day of January, 1910, and while the said Schott Engineering Company was engaged in the performance of the said contract mentioned in the declaration, a petition of involuntary bankruptcy was

filed against said Schott Engineering Company, a corporation, as aforesaid, and the Central Trust Company of

Illinois, a corporation organized and existing under the laws of the state of Illinois, was appointed receiver of the estate and assets of the said Schott Engineering Company by an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, and that immediately upon its appointment as receiver it took possession of the property and assets of said bankrupt.

Defendant further avers that thereafter, on or about January 27, 1910, the said Schott Engineering Company was, by an order entered in said District Court of United States for the Northern District of Illinois, adjudged a bankrupt; that thereafter, on to-wit: January 31, 1910, said receiver of said bankrupt, the Central Trust Company of Illinois, filed its petition in the District Court of Illinois, representing to the court that this said defendant had theretofore entered into the said contract described in the declaration, with the United States Government, and further represented to the Court that early in the month of January, 1909, this said defendant sold, assigned, transferred and set over to the Schott Engineering Company, the above bankrupt, all right, title and interest in and to the aforesaid contract, and further represented to the court that since the organization of the Schott Engineering

Company all of the work under said contract was performed and material furnished by the said Schott Engineering Company, and that at the time the said receiver was appointed, the said Schott Engineering Company was engaged in the 138 completion of said contract, and prayed the instruction of the Court as to whether or not the said receiver should continue with the said work and complete the same.

Defendant further avers that said Court upon said petition thereupon entered an order that said receiver should continue with the work in hand on said contract until February 8, 1910, and that the said receiver should notify the creditors who had furnished labor and material on said work by letter of the condition of the said work and seek their advice with reference to its continuance, and that thereafter the said receiver addressed and forwarded a letter to all the said creditors, including the plaintiffs, and each and every one of them in this suit, in which it was stated that the said contract, in January, 1910, had been assigned by this said defendant to the Schott Engineering Company; that in consideration of the assignment of the said contract described in the declaration herein by this said defendant to the Schott Engineering Company, the said Company delivered certain shares of its capital stock to this said defendant, and that since said date all the work done under said contract had been done by the said Schott Engineering Company; and said letter further set forth the condition of the work with reference to the work done and the work to be completed, moneys already paid out and moneys to be paid and moneys due on said contract to the United States Government, and asking their advice and consent concerning the completion of the said work in the declaration mentioned by the said receiver of the Schott Engineering Company; that thereafter the plaintiffs in this cause, and each and every one

of them, replied to this letter and did advise and consent 139 to the completion of said work by the receiver of the said

Schott Engineering Company, and that said advice and consent of the said plaintiffs, and each of them, were called to the attention of the Judge in said Court, and the said Court, on February 8, 1910, entered an order by which the said receiver of the said Schott Engineering Company was authorized and directed to complete said works, and the said receiver did thereafter, pursuant to said order, finish the said contract.

Defendant further avers that therefore the said plaintiffs, and each and every one of them in this cause, sold, delivered, furnished and supplied divers and sundry quantities of ma-

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Schott, fil
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Additional plea
W. H.
Schott, filed
Nov. 14, 1912.

terial, and furnished labor to the said receiver of the said bankrupt in and about the completion of the said contract, and were paid for the same by said receiver.

Defendant further avers that thereafter the said plaintiffs in this cause, and each of them, did file with the referee in bankruptcy in the bankrupt proceedings of the said Schott Engineering Company claims that were sworn to in and by which said several claims the said plaintiffs in this cause, and each of them, did aver upon oath that they and each of them, furnished the labor and material sought to be recovered for in this suit to said Schott Engineering Company, and that said Schott Engineering Company was and still is truly indebted to the said plaintiffs, and each of them, for the same labor and materials sought to be recovered for in this suit, and for the full amount sought to be recovered in this suit by said plaintiffs and each of them.

140 Wherefore, he prays judgment if the said plaintiffs, or any or either of them, ought to have their aforesaid action against him, etc.

W. N. HORNER &
JARRELL & McNEIL,
Attorneys for W. H. Schott.

(Endorsed) Filed Nov. 14, 1912, T. C. MacMillan, Clerk.

141 And on to-wit: the sixth day of December, 1912 come the plaintiff in said entitled cause by its attorney and filed in the Clerk's office of said Court its certain Replications to the Pleas of Illinois Surety Company and W. H. Schott in words and figures following to-wit:

REPLICATION.

Replication,
filed Dec.
1912.

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division,
October Term, A. D. 1912.

United States of America, for the use and benefit of James E. Clow & Sons, a Corporation, <i>et al</i> ,	} Gen. No. 30486.
<i>Plaintiffs,</i>	
<i>vs.</i>	
Illinois Surety Company, a Corpora- tion, and W. H. Schott,	
<i>Defendants.</i>	

Replications of Plaintiffs to the Pleas of Illinois Surety Com-
pany and W. H. Schott.

And the plaintiffs, as to the first and sixth pleas of the de-
fendant, Illinois Surety Company, and as to the first, fourth
and fifth pleas of the defendant, W. H. Schott, and whereof
they have put themselves upon the country, the plaintiffs do
the like.

And the plaintiffs further say that by reason of anything in
said second plea of said defendant, Illinois Surety Company,
and in said second plea of said defendant, W. H. Schott, al-
leged, they ought not to be barred from having their afore-
said action, because they say that since the making of the said
writing obligatory and condition thereof they have been dam-
nified as the plaintiffs, and each of them, have in their said
declaration and in each count thereof above alleged. And this
the plaintiffs pray may be inquired of by the country.

And the plaintiffs further say that by reason of
143 anything in the third plea of the defendant, Illinois Surety
Company, and in the third plea of the defendant, W. H.
Schott, alleged, they ought not to be barred from having their
aforesaid action, because they say that they have been damni-
fied by the wrong of said defendants and by and through the
means and default of said defendants and not through their

lication,
led Dec. 6,
1912.

own wrong nor their own means or default, as the plaintiffs have in their said declaration and each count thereof above alleged. And this the plaintiffs pray may be inquired of by the country.

WYETH AND SMITH,
KNAPP AND CAMPBELL AND R. E. CHURCH,
ISAAC M. JORDAN,
HOLT, WHEELER AND SIDLEY,
W. B. MOULTON,
JOHN D. CLANCY,
TENNEY, COFFEEN, HARDING AND SHERMAN,
Attorneys for Plaintiffs.

(Endorsed) Filed Dec., 6, 1912, T. C. MacMillan, Clerk.

ter of May
10, 1913.

144 And on to-wit: the twentieth day of May, 1913, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

145 IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

Tuesday, May 20, 1913, Present Hon. A. L. Sanborn, District Judge.

United States of America, for the use
and benefit of James B. Clow &
Sons, et al.,

Plaintiffs,

vs.

Illinois Surety Company, a corpora-
tion, and W. H. Schott,

Defendants.

No. 30486.
In Debt.

ORDER.

On this the 20th day of May, A. D. 1913, upon motion heretofore made by plaintiff and all the use plaintiffs herein, it is ordered that, and leave is hereby granted to, the said plaintiff and the use plaintiffs, first, to amend the original declaration

(a) By striking out the figures \$31047.18 standing on the

first page of said original declaration, opposite the title of the cause, and by substituting therefor the figures \$40000.00, and

Order of May
20, 1913.

(b) By striking out in the last paragraph on page 11 of said original declaration the following words and figures: "Thirty-one Thousand Forty-seven Dollars and eighteen cents (\$31047.18)", and by substituting therefor the following words and figures: "Forty Thousand Dollars and no cents (\$40000.-00).

Second, to amend all of the Bills of Particulars heretofore filed, by including in the said Bills of Particulars a statement or claim for interest from the date of the institution of the above entitled cause.

SANBORN, J.

146 And on the same day to-wit: the twentieth day of May, 1913, come the plaintiff in said entitled cause by its attorney and by leave of Court first had and obtained, filed in the Clerk's office of said Court its Amendment to Original Declaration, in words and figures following to-wit:

Amendment to
original de-
claration, file
May 20, 1913

147 AMENDMENT TO ORIGINAL DECLARATION.

IN THE CIRCUIT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

United States of America, for the use
and benefit of James B. Clow &
Sons, et al.,

Plaintiffs,

vs.

Illinois Surety Company, a corpora-
tion, and W. H. Schott,

Defendants.

No. 30486.

In Debt.

Amendment to Original Declaration.

Now comes the plaintiff on this the 20th day of May, A. D. 1913, leave of Court having been first had and obtained, and amends its original declaration filed in the above entitled cause, first, by striking out the figures \$31047.18, standing on the

Amendment to
original dec-
laration, filed
May 20, 1913.

first page of said original declaration opposite the title of the cause, and by substituting therefor the figures \$40000.00; and second, by striking out in the last paragraph on page 11 of said original declaration the following words and figures: "Thirty-one Thousand Forty-seven Dollars and eighteen cents (\$31047.18)", and by substituting therefor the following words and figures: "Forty Thousand Dollars and no cents (\$40000.00).

HOLT, WHEELER & SIDLEY,
KNAPP & CAMPBELL,
RALPH E. CHURCH,
WYETH & SMITH,
GLENNON, CARY, WALKER & HOWE,
Attorneys for Plaintiff.

(Endorsed) Filed May 20, 1913, T. C. MacMillan, Clerk.

rial.

148 And on to-wit: the twentieth day of May, 1913, in the record of proceedings thereof, in said entitled cause before the Hon. A. L. Sanborn District Judge, appears the following entry to-wit:

United States of America for use etc.	} 30486.
<i>vs.</i>	
Illinois Surety Company, et al.	

This case being called for trial now come the parties by their attorneys, and come also the following jurors, to-wit: William Ullrich, Victor Bergman, Frank Behn, R. W. Hal Geo. Oestmann, Henry J. Moniot, G. Carlson, Henry Se hausen, LaFayette W. Brewer, Jr., Wm. McElray, L. D. Gu lich and D. F. Madison, who are all duly elected, tried and sworn to well and truly try said issue and a true verdict render according to the law and the evidence; thereupon after hearing the opening statements of counsel, evidence for the plaintiff is heard in part and the further trial of this cause postponed until tomorrow morning.

149 And on to-wit: the twenty-second day of May, 1913, the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears following entry to-wit:

150

UNITED STATES DISTRICT COURT

Trial.

Northern District of Illinois

Eastern District

Thursday, May 22, 1913, Present: Hon. A. L. Sanborn, District Judge.

United States for use of James B.	}	No. 30486.
Clow & Sons, et al.,		
vs.		
Illinois Surety Company and W. H. Schott.		

On motion of defendant, W. H. Schott, and argument heard thereon, it is hereby ordered that the demurrer of the plaintiffs to the plea of defendant, W. H. Schott, filed herein on October 24, 1911, and additional plea, No. 9, filed July 10, 1912, by said defendant, W. H. Schott be and the same is hereby overruled, to which ruling and order of the Court, the plaintiffs except and hereby elect to stand by their demurrers to said pleas.

Judge.

151 And on to-wit: the twenty-second day of May 1913, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit.

152 IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

Thursday, May 22, 1913. Present: Hon. A. L. Sanborn, District Judge.

United States for use of James B.	} No. 30486
Clow & Sons, et al,	
vs.	
Illinois Surety Company and W. H. Schott.	

Now come Knapp and Campbell and Ralph E. Church, who suggest the death of F. Bairstow, plaintiff and claimant herein, and who suggest also that Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer are Executors of the Will of said F. Bairstow, Deceased.

It Is Therefore Ordered, Adjudged And Decreed that said Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer be and are hereby made parties plaintiff in the above entitled cause for plaintiff and claimant, F. Bairstow, as aforesaid.

SANBORN, J.

153 And on to-wit: the twenty-third day of May, 1913, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

United States of America for use etc.	} 30486.
vs.	
Illinois Surety Company, et al.	

Now come the parties by their attorneys and comes also said jury and the trial of this cause is resumed. Further argument on the defendants' motion for an instructed verdict is heard and concluded and the motion of the plaintiff that the jury be instructed for the plaintiff is heard and concluded. Thereupon the Court discharges said jury from the further consid

eration of the case upon the ground that the whole matter be submitted to the Court upon the motions of the respective parties heretofore heard, and the Court takes the matter under advisement and the trial of this case is postponed until Thursday, May 29th at 9 A. M. Trial.

154 And on to-wit: the twelfth day of November, 1913, in the record of proceedings thereof, in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

United States for use James B. Clow & Sons, et al.	}	30486.
<i>vs.</i>		
Illinois Surety Company and W. H. Schott.		

On motion of defendant, W. H. Schott, it is hereby ordered that the pleas of defendant, W. H. Schott, filed herein on October 24th, 1911, and additional plea, No. 9, filed July 10th, 1912, stand as pleas not only to the declaration of the original plaintiffs but to the declarations and intervening petitions of all plaintiffs herein.

And it appearing to the Court that all the plaintiffs and intervening petitioners have demurred to the said pleas, it is further ordered that the demurrers to said pleas be and the same are hereby over-ruled, to which ruling and order of the Court, the plaintiffs and intervening petitioners except and hereby elect to stand by their demurrers to said pleas.

A. L. SANBORN,
Judge.

155 (And on to-wit: the sixth day of February, 1914, there was filed in the Clerk's office of said Court in said entitled cause a certain Findings of Fact, which is set out in the bill of exceptions filed herein and not copied here.)

156 And on to-wit: the sixth day of February, 1914, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

gment of
Feb. 6, 1914.

157 IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

Friday, February 6, 1914, Preset: Hon. A. L. Sanborn, District Judge.

United States, for use of James B.	} No. 30486
Clow & Sons, et al,	
vs.	
Illinois Surety Company and W. H. Schott.	

This cause having come on for trial on the 20th day of May, 1913, before the Honorable Arthur L. Sanborn, one of the Judges of said court, and a jury, upon the issues joined between the said plaintiffs and the said defendants, and after all of the evidence had been introduced, the defendant, Illinois Surety Company, and the defendant Schott, moved the court to direct the jury to find the issues in favor of said defendants, and thereupon all of the plaintiffs moved the court to direct the jury to find the issues in favor of the plaintiffs, whereupon the court discharged the jury, and after argument of counsel, the court, on the 6th day of February, 1914, made and filed special findings of fact and conclusions of law, wherein the court finds that United States of America, for the use of the plaintiffs, The John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and Roebling Construction Company, recover from the defendant, Illinois Surety Company in debt, the sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18) and assesses the plaintiffs damages for the use of said plaintiffs in the sum of Fifteen Thousand Three Hundred Thirty-three Dollars and Twenty-four Cents (\$15,333.24), as follows:

For the use of The John Davis Company.....	\$11,118.7
" " " " Universal Portland Cement Company	1,123.8
" " " " Standard Underground Cable Company	2,880.6
" " " " Racine Stone Company.....	127.2
" " " " Roebling Construction Company.....	82.7

And wherein the court further finds the issues for the defendant, Illinois Surety Company, with respect to the use plaintiffs, James B. Clow & Sons, M. H. Hussey, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Maloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, and Charles A. Daniel, trading as Quaker City Rubber Company;

Therefore, It Is Ordered By The Court that the United States of America, for the use of The John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and Roebling Construction Company, do have and recover of and from the defendant, Illinois Surety Company, said debt of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18) and said damages of Fifteen Thousand Three 159 Hundred Thirty-three Dollars and Twenty-four Cents (\$15,333.24), as follows:

For the use of The John Davis Company.....	\$11,118.72
" " " " Universal Portland Cement Company.	1,123.83
" " " " Standard Underground Cable Company	2,880.69
" " " " Racine Stone Company.....	127.28
" " " " Roebling Construction Company.....	82.72

together with their costs and charges in this behalf expended and have execution therefor; and,

It Is Further Ordered that upon the payment of said damages with interest thereon and costs of suit, said debt be discharged; and,

It Is Further Ordered that the claims of said James B. Clow & Sons, M. H. Hussey, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company,

gment of
Feb. 6, 1914.

Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Maloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, and Charles A. Daniel, trading as Quaker City Rubber Company, and each of them, be and are hereby dismissed, and as to said claims defendant, Illinois Surety Company, go hence without day and that said defendant have and recover its costs and charges 160 in this behalf expended and have execution therefor.

And it appearing to the court that the demurrers of the plaintiffs and intervening petitioners herein taken as plaintiffs to the certain pleas of bankruptcy filed herein by defendant, W. H. Schott, October 24, 1911, and July 10, 1912, were overruled by the court and that all of said plaintiffs elected to stand by their said demurrers and still do so elect;

Therefore, It Is Ordered By The Court that the defendant, W. H. Schott, go hence without day and do have and recover from the said use plaintiffs, and each of them, his costs and charges in this behalf expended and have execution therefor.

A. L. SANBORN,
Judge.

161 And on the same day to-wit: the sixth day of February, 1914, come the United States of America for the use of The John Davis Company, et al., by its attorney and filed in the Clerk's office of said Court its certain Petition for a Writ of Error in words and figures following to-wit:

162 PETITION FOR WRIT OF ERROR BY UNITED STATES FOR USE OF THE JOHN DAVIS CO., ET AL.

Petition for writ of error by United States, filed Feb. 1914.

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

United States, for use of James B.	} No. 30486
Clow & Sons, et al,	
vs.	
Illinois Surety Company and W. H. Schott.	

To The Honorable Arthur L. Sanborn,
One of the Judges of the District Court
of the United States:

Now come United States for the use of The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, The Roebling Construction Company, The Western Kiel Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, Nancy W. Watrous, trading as G. B. Watrous Sons and Maloney Electric Company, plaintiffs in error, and say that on or about the 6th day of February, A. D. 1914, the District Court of the United States for the Northern District of Illinois, Eastern Division, entered judgment against the defendant in error, Illinois Surety Company, and in favor of the United States of America, for the use of The John Davis Company, Universal Portland Cement Company, Standard Underground

163 Cable Company, Racine Stone Company and the Roebling Construction Company, in debt, in the sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18), said debt to be discharged upon the payment of damages with interest, as follows:

To The John Davis Company	\$11,118.72
To Universal Portland Cement Company	1,123.83

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To Standard Underground Cable Company	2,880.69
To Racine Stone Company	127.28
To The Roebling Construction Company	82.72

together with their costs and charges; that said court entered judgment against plaintiffs in error, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, Nancy W. Watrous, trading as G. B. Watrous Sons, and Maloney Electric Company, and in favor of Illinois Surety Company, and that as to the defendant, W. H. Schott, said court entered judgment against all of the plaintiffs in error herein before mentioned, in a suit pending, wherein the United States of America, for the use of The John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, 164 George H. Bairstow and Jessie B. Blackmer, executors of F. Bairstow, deceased, M. H. Hussey, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Nancy W. Watrous Sons, doing business as G. B. Watrous Sons, James B. Clow & Sons, Scott Valve Company, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, and Maloney Electric Company were parties plaintiff and Illinois Surety Company and W. H. Schott were defendants, in which judgment and the proceedings had prior thereto in said cause certain errors were made to the prejudice of these plaintiffs in error, all of which will more fully appear from the assignment of errors which is filed with this petition.

Petition for
writ of error
by United
States, etc.
filed Feb. 6
1914.

Wherefore, these plaintiffs in error pray that a writ of error issue in this behalf out of this court, directed to the District Court of the United States for the Northern District of Illinois, Eastern Division, for the sending to the United States Circuit Court of Appeals for the Seventh Circuit a transcript of the record, proceedings and papers in said cause and for the correction of errors so complained of.

Your petitioners further pray for an order fixing the amount of bond, conditioned as required by law and that all proceedings in said cause be suspended and stayed until the final 165 determination of this suit.

THE UNITED STATES FOR THE USE

THE JOHN DAVIS COMPANY,

EMMA E. BAIRSTOW,

GEORGE H. BAIRSTOW and

JESSIE B. BLACKMER,

Executors of the Will of F.

Bairstow, Deceased,

STANDARD UNDERGROUND CABLE COMPANY,

GEORGE RACKY,

D. E. GARRISON, JR., and

CORRUGATED BAR COMPANY,

UNITED STATES EQUIPMENT COMPANY,

THE ROEBLING CONSTRUCTION COMPANY,

THE WESTERN KIELY STEAM SPECIALTY

COMPANY,

H. W. JOHNS-MANVILLE COMPANY,

STEBBINS HARDWARE COMPANY,

COMMONWEALTH EDISON COMPANY,

JAMES B. CLOW & SONS,

SCOTT VALVE COMPANY,

ELECTRIC APPLIANCE COMPANY,

WESTERN ROOFING & SUPPLY COMPANY.

CHARLES A. DANIEL,

MALONEY ELECTRIC COMPANY,

NANCY W. WATROUS,

By KNAPP & CAMPBELL,

WYETH & SMITH,

GLENNON, CAREY, WALKER & HOWE,

and

HOLT, CUTTING & SIDLEY,

Their Attorneys.

(Endorsed) Filed Feb. 6, 1914, T. C. MacMillan, Clerk.

Assignment of
Errors of
United
States, etc.,
Filed Feb. 6,
1914.

166 And on the same day to-wit: the sixth day of February 1914, come the United States of America, for the use of The John Davis Company, et al by its attorney and filed in the Clerk's office of said Court its certain assignment of errors in words and figures following to-wit:

167 ASSIGNMENT OF ERRORS OF UNITED STATES OF AMERICA, FOR THE USE OF, ETC.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
For the Seventh Circuit.

United States for the use of The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, Nancy W. Watrous, trading as G. B. Watrous Sons, and Maloney Electric Company,

Plaintiffs in Error,

vs.

Illinois Surety Company and W. H. Schott,

Defendants in Error.

Now come the above named plaintiffs in error and make and file this their Assignment of Errors.

1. The court erred in overruling the demurrers of the plain-

Assignment
errors of
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States, et
c. filed Feb.
1914.

tiffs in error to the pleas of W. H. Schott filed October 24, 1911, and additional plea No. 9, filed July 10, 1912, which said pleas set up the discharge of said Schott in bankruptcy.

2. The court erred in holding that the discharge of said Schott in bankruptcy constituted a defense to an action upon the bond sued upon.

168 3. The court erred in that it did not hold and find that the defendants, Illinois Surety Company and W. H. Schott, were liable for and indebted to the plaintiffs in error and each of them to the amount of the penalty of the bond and interest, for all work and material which was furnished for and used in the prosecution of the work covered by the contract between the United States Government and W. H. Schott, with interest thereon from August 16, 1911.

4. The court erred in that it did not find that the defendants in error were severally and jointly liable to the plaintiffs in error to the amount of the penalty of the bond and interest, in the following amounts set opposite their respective names, and in that it did not enter judgment and assess damages for said amounts, together with interest thereon from August 16, 1911:

The John Davis Company	\$16,661.70
Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased	628.07
Standard Underground Cable Company	2,750.70
George Racky, doing business as Racky & Sons Iron Works	389.55
D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company	75.25
United States Equipment Company	192.39
The Roebling Construction Company	172.68
The Western Kiely Steam Specialty Company	150.00
H. W. Johns-Manville Company	681.50
Stebbins Hardware Company	171.15
Commonwealth Edison Company	74.04
James B. Clow & Sons	2,015.54
Scott Valve Company	365.14
Electric Appliance Company	565.28
Western Roofing & Supply Company	4,873.41
169 Charles A. Daniel, trading as Quaker City Rubber Company	\$630.33
Nancy W. Watrous, trading as G. B. Watrous Sons	379.85
Maloney Electric Company	6,611.01

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5. The court erred in holding and finding in the finding of fact that the Schott Engineering Company became and was the principal in the contract between United States, America and W. H. Schott involved in this suit, after January 2, 1909, as found in Paragraph 5-(c), 14-(b) and 14-(e).

6. The court erred in finding in Paragraph 5-(e) of its findings that The John Davis Company participated in and was one of the controlling factors in bringing about the substitution of the Schott Engineering Company as principal in the place of Schott Individually in the contract between the United States and Schott.

7. The court erred in finding in Paragraph 14-(b) of its findings that The John Davis Company substituted a new principal in the contract involved in this case.

8. The court erred in finding in Paragraph 14-(e) of its findings that The John Davis Company consented to and helped to bring about the substitution of a new principal in the contract; that the assignment contract was entered into in the instance of The John Davis Company and changed and altered the contract for which the Surety Company gave bond and forced a new principal into said contract without the consent of the Surety Company.

9. The court erred in finding in Paragraph 18-(a) of its findings that the Western Roofing & Supply Company dealt only with the Schott Engineering Company in making 170 sales or deliveries for which claim is made in this suit.

10. The court erred in holding in its third conclusion of law that the assignment by W. H. Schott to the Schott Engineering Company of the contract in question released the surety as to all material sold and delivered by any of the plaintiffs in error after January 2, 1909, except in the case of the Racine Stone Company.

11. The court erred in holding in the fourth conclusion of law that the Schott Engineering Company became a principal in the Government contract as to all persons except the Government.

12. The court erred in holding in the sixth conclusion of law that there was no privity of contract existing between the Surety Company and the Schott Engineering Company.

13. The court erred in holding in the seventh conclusion of law that the Western Roofing & Supply Company ratified and confirmed the assignment of the contract from Schott to the Schott Engineering Company.

14. The court erred in holding in the eighth conclusion

of law that all materials sold and delivered by The John Davis Company after January 2, 1909, were sold to the Schott Engineering Company.

15. The court erred in holding in the tenth conclusion of law that The John Davis Company consented to and helped to bring about the substitution of a new principal in the contract; that the assignment contract which was entered into at the instance of said The John Davis Company changed and altered the contract for which the Surety Company gave 171 its bond and forced a new principal into the contract without the consent of the Surety Company.

16. The court erred in holding in the eleventh conclusion of law that the Western Roofing & Supply Company made but one delivery to Schott and that the Surety Company is not liable therefor and that said Supply Company dealt only with the Engineering Company in making the sales or deliveries for which claim is made in this suit.

17. The court erred in holding in the twelfth conclusion of law that the rentals and freight for machinery furnished by the United States Equipment Company are not labor or materials of such kind and character as to entitle the United States Equipment Company to recover for the same and that the Equipment Company is not entitled to recover against the Illinois Surety Company.

18. The court erred in that it did not find as a matter of law that the defendants in error were not liable for all of the labor, material and supplies covered by the claims involved in this suit, which were furnished for and used in the prosecution of the work covered by the contract between the United States and Schott to the extent of the penalty of the bond and interest.

19. The court erred in finding the issues for the defendants in error and entering judgment against the following defendants: Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment 172 Company, The Western Kiely Steam Specialty Company,

H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, Nancy W. Watrous,

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trading as G. B. Watrous Sons, and Maloney Electric Company.

20. The court erred in entering judgment in favor of W. H. Schott and against all of the plaintiffs in error as against said Schott.

21. The court erred in that it did not assess damages in the judgment against each of the defendants in error in favor of the plaintiffs in error to the amount of the penalty of the bond and interest, for all work and material which was furnished for and used in the prosecution of the work covered by the contract between United States Government and W. H. Schott, together with interest on said damages from August 16, 1911.

UNITED STATES, FOR THE USE OF

THE JOHN DAVIS COMPANY,

EMMA E. BAIRSTOW,

GEORGE H. BAIRSTOW and

JESSIE B. BLACKMER,

Executors of the Will of F.

Bairstow, Deceased,

STANDARD UNDERGROUND CABLE COMPANY,

GEORGE RACKY,

D. E. GARRISON, JR., and

CORRUGATED BAR COMPANY,

UNITED STATES EQUIPMENT COMPANY,

THE ROEBLING CONSTRUCTION COMPANY,

THE WESTERN KIELY STEAM SPECIALTY
COMPANY,

H. W. JOHNS-MANVILLE COMPANY,

STEBBINS HARDWARE COMPANY,

COMMONWEALTH EDISON COMPANY,

JAMES B. CLOW & SONS,

SCOTT VALVE COMPANY,

ELECTRIC APPLIANCE COMPANY,

WESTERN ROOFING & SUPPLY COMPANY,

CHARLES A. DANIEL,

NANCY M. WATROUS and

MALONEY ELECTRIC COMPANY.

By KNAPP & CAMPBELL,

GLENNON, CARY, WALKER & HOWE,

WYETH & SMITH,

HOLT, CUTTING & SIDLEY.

(Endorsed) Filed Feb. 6, 1914, T. C. MacMillan, Clerk.

173 And on the same day to-wit: the sixth day of February, 1914, in the record of proceedings thereof, in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

Order of Feb.
6, 1914.

United States for use of James B.	}	30486
Clow & Sons, <i>et al</i> ,		
<i>vs.</i>		
Illinois Surety Company and W. H. Schott.		

Now come the United States for the use of The John Davis Company and others and present to the Court their petition for writ of error and assignments of error and move the Court for the allowance of a writ of error to the United States Circuit Court of Appeals for the Seventh Circuit; and thereupon

It Is Ordered by the Court that said writ of error be and the same is hereby allowed upon the filing of a bond by said plaintiffs in the sum of One thousand dollars (\$1000.00) with surety to be approved by the Clerk.

209 United States }
of America, } ss.

Writ of error,
filed Feb. 6,
1914.

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, Greeting: Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you or some of you, between the United States of America, for the use of The John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, executors of F. Bairstow, deceased, M. H. Hussey, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Nancy W. Watrous, doing business as

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G. B. Watrous Sons, James B. Clow & Sons, Scott Valve Company, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, and Moloney Electric Company, plaintiffs, and Illinois Surety Company and W. H. Schott, defendants, a manifest error hath happened, to the great damage of said plaintiffs, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Seventh Circuit at Chicago within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 6th day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen.

T. C. MacMILLAN,

Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by:

A. L. SANBORN,
District Judge.

(Endorsed) Gen. No. 30486 In the United States Circuit Court of Appeals, for the Seventh Circuit. United States for the use of The John Davis Company, et al, vs. Illinois Surety Company and W. H. Schott. Writ of Error. Filed Feb 6 1914 T. C. MacMillan, Clerk.

And on the same day to-wit: the sixth day of February 1914, come the United States of America, for the use of The John Davis Company, et al, by its attorney and filed in the Clerk's office of said Court its certain bond in words and figures following to-wit:

Know All Men by These Presents, That we, The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., Corrugated Bar Company, United States Equipment Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, Maloney Electric Company, Nancy W. Watrous and United States Fidelity & Guaranty Company are held and firmly bound unto Illinois Surety Company and W. H. Schott in the full and just sum of One Thousand Dollars (\$1,000) to be paid to the said Illinois Surety Company and W. H. Schott, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Bond on writ
of error,
Feb. 6, 1

Sealed with our seals and dated this 6th day of February, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court, between United States, for the use of The John Davis Company and others, plaintiffs, and Illinois Surety Company and W. H. Schott, defendants, the said United States, for the use of The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., Corrugated Bar Company, United States Equipment Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, Maloney Electric Company and Nancy W. Watrous have obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Illinois Surety Company and W. H. Schott, citing and admonishing them to

ad on writ
of error, filed
Feb. 6, 1914.

be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the Condition of the Above Obligation is such, That if the said United States, for the use of The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., Corrugated Bar Company, United States Equipment Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, Maloney Electric Company and Nancy W. Watrous shall prosecute their writ to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE JOHN DAVIS COMPANY,
EMMA E. BAIRSTOW,
GEORGE H. BAIRSTOW,
JESSIE B. BLACKMER,

*Executors of the Will of F.
Bairstow, Deceased.*

By KNAPP & CAMPBELL,
Their Attorneys.

GEORGE RACKY,
D. E. GARRISON, JR.,
CORRUGATED BAR COMPANY,
UNITED STATES EQUIPMENT COMPANY,
THE ROEBLING CONSTRUCTION COMPANY,
THE WESTERN KIELY STEAM SPECIALTY
COMPANY,
H. W. JOHNS-MANVILLE COMPANY,
STEBBINS HARDWARE COMPANY,
COMMONWEALTH EDISON COMPANY,
JAMES B. CLOW & SONS,
SCOTT VALVE COMPANY,
ELECTRIC APPLIANCE COMPANY,
STANDARD UNDERGROUND CABLE COMPANY,
MALONEY ELECTRIC COMPANY,

By WYETH & SMITH,
Their Attorneys.

WESTERN ROOFING & SUPPLY COMPANY,
By HOLT, CUTTING & SIDLEY,

Its Attorneys.

CHARLES A. DANIEL,
By TENNEY, HARDING & SHERMAN,
His Attorneys.

NANCY W. WATROUS,
By EDWIN C. CRAWFORD,
Her Attorney.

Bond on writ
of error, filed
Feb. 6, 1914.

Approved Feb. 6, 1914.

T. C. MacMILLAN,
Clerk.

By JOHN H. JAMAR,
Deputy Clerk.

(Endorsed) Filed Feb. 6, 1914. T. C. MacMillan, Clerk.

76 And on to-wit: the sixth day of February, 1914, come
the Illinois Surety Company by its attorney and filed in
the Clerk's office of said Court in said entitled cause its cer-
tain Petition for Writ of Error and Assignment of Errors.
Said Petition for Writ of Error and Assignment of Errors,
are respectively in the words and figures following to-wit:

United States of America, }
State of Illinois, } ss.
County of Cook. }

United States of America, for the use
of James B. Clow & Sons *et al.*,
Plaintiffs,
vs.
Illinois Surety Company, and W. H.
Schott,
Defendants.

Gen. No. 30,486.
At Law.

Now comes the Illinois Surety Company, one of the defendants herein, and says that on or about the 6th day of February, A. D. 1914, this court entered a judgment in the above entitled cause in favor of the said plaintiff, United States of America, for the use and benefit of the John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and the Roebling Construction Company, and for the use and benefit of each of the said use plaintiffs against the said defendant, Illinois 178 Surety Company, in the sum of \$31,047.18, said debt to be discharged upon the payment of damages, with interest, as follows:

To the John Davis Company,	\$11,118.72;
To the Universal Portland Cement Company,	1,123.83;
To the Standard Underground Cable Company,	2,880.69;
To the Racine Stone Company,	127.28;
To the Roebling Construction Company,	82.72;
together with their costs, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the said defendant, Illinois Surety	

Company, all of which will more fully appear from the assignment of errors which is filed with this petition.

Petition for
writ of er
of Illinois
Surety Co
filed Feb.
1914.

Your petitioner, Illinois Surety Company, further shows to the court that heretofore, on the 4th day of February, A. D. 1914, it served notice on each of the use plaintiffs in this cause that it would apply on this day for a writ of error from said judgment in favor of the above mentioned use plaintiffs, and each of them, when entered by the court on this date, and also served a similar notice on the said defendant, W. H. Schott, and notified the said use plaintiffs, and said Schott, to join this defendant in suing out a writ of error from the 179 judgment in favor of the above mentioned use plaintiffs, to-wit: John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company, and Roebling Construction Company.

Wherefore, this defendant, Illinois Surety Company, prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Seventh Circuit, directed to the District Court of the United States, for the Northern District of Illinois, Eastern Division, for the sending to the said United States Circuit Court of Appeals for the Seventh Circuit a transcript of the record, proceedings and papers in said cause, and for the correction of the errors so complained of.

Your petitioner further prays for an order fixing the amount of bond conditioned as required by law, and that all proceedings in said cause be suspended and stayed until the final determination of this suit, and that such other and further orders may be had as may be proper in the premises.

ILLINOIS SURETY COMPANY,
By HOPKINS, PEFFERS & HOPKINS,
Its Attorneys.

(Endorsed) Filed Feb. 6, 1914, T. C. MacMillan, Clerk.

Assignment of
errors of Il-
linois Surety
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Feb. 6, 1914.

180 ASSIGNMENT OF ERRORS OF ILLINOIS SURETY COMPANY.

United States of America, }
State of Illinois, } ss.
County of Cook.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

United States of America, for the use of James B. Clow & Sons, <i>et al.</i> , <i>Plaintiffs,</i>	} At Law. Petition for Writ of Error. Gen. No. 30486.
<i>vs.</i>	
Illinois Surety Company, and W. H. Schott, <i>Defendants.</i>	

Assignment of Errors.

The said defendant in this action, the Illinois Surety Company, in connection with its petition for writ of error, makes and files the following assignment of errors, which it avers were committed by the court in the rendition of the said judgment against said defendant, Illinois Surety Company, to-wit:

1. The court erred in sustaining the demurrer of the use plaintiffs, the John Davis Company, the Universal Portland Cement Company, the Standard Underground Cable Company, the Racine Stone Company and the Roebling Construction Company, and each of them, to the pleas of the defendant, Illinois Surety Company, numbered 7, 8, 9 and 10, and each of the same.

2. The said Circuit Court erred in sustaining the demurrers of the use plaintiff, the John Davis Company, to pleas numbered 6, 7, 8, 9 and 10 of said defendant, Illinois Surety Company, and each of said pleas.

3. The said Circuit Court erred in sustaining the demurrers of the use plaintiff, the Standard Underground Cable

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Company, to pleas numbered 7, 8, 9 and 10, and each of the same, of said defendant, Illinois Surety Company.

4. The court erred in refusing to direct a verdict in favor of this defendant, Illinois Surety Company, as to the claims of said The John Davis Company, the Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company, and Roebling Construction Company, and each of them.

5. The court erred in not holding that the said John Davis Company, under the evidence was not entitled to recover.

182 6. The court erred in not holding that the said Universal Portland Cement Company, under the evidence was not entitled to recover.

7. The court erred in not holding that the said Standard Underground Cable Company, under the evidence was not entitled to recover.

8. The court erred in not holding that the said Racine Stone Company, under the evidence was not entitled to recover.

9. The court erred in not holding that the said Roebling Construction Company, under the evidence was not entitled to recover.

10. The trial court erred in not holding, under the facts found by the court, that the said John Davis Company was not entitled to recover against the said defendant, the Illinois Surety Company.

11. The trial court erred in not holding under the facts found by the court that the said Universal Portland Cement Company was not entitled to recover against the said defendant, the Illinois Surety Company.

12. The trial court erred in not holding under the facts found by the court that the said Standard Underground Cable Company was not entitled to recover against the said defendant, the Illinois Surety Company.

183 13. The trial court erred in not holding, under the facts found by the court, that the said Racine Stone Company was not entitled to recover against the said defendant, the Illinois Surety Company.

14. The trial court erred in not holding, under the facts found by the court, that the said Roebling Construction Company was not entitled to recover against the said defendant, the Illinois Surety Company.

15. The findings of fact of the court are insufficient to sup-

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port the judgment in favor of the use plaintiff, the John Davis Company.

16. The findings of fact of the court are insufficient to support the judgment in favor of the use plaintiff, the Universal Portland Cement Company.

17. The findings of fact of the court are insufficient to support the judgment in favor of the use plaintiff, the Standard Underground Cable Company.

18. The findings of fact of the court are insufficient to support the judgment in favor of the use plaintiff, the Racine Stone Company.

19. The findings of fact of the court are insufficient to support the judgment in favor of the use plaintiff, the Roebling Construction Company.

20. The court erred in failing and refusing to enter judgment, respecting the claim of the John Davis Company, in favor of the defendant, the Illinois Surety Company, on the facts found by the court.

21. The court erred in failing and refusing to enter judgment, respecting the claim of the Universal Portland Cement Company, in favor of the defendant, the Illinois Surety Company, on the facts found by the court.

22. The court erred in failing and refusing to enter judgment, respecting the claim of the Standard Underground Cable Company, in favor of the defendant, the Illinois Surety Company, on the facts found by the court.

23. The court erred in failing and refusing to enter judgment, respecting the claim of the Racine Stone Company, in favor of the defendant, the Illinois Surety Company, on the facts found by the court.

24. The court erred in failing and refusing to enter judgment, respecting the claim of the Roebling Construction Company, in favor of the defendant, the Illinois Surety Company, on the facts found by the court.

25. The court erred in holding the following conclusions of law, as follows:

(1) The work called for by the contract between Schott and the Government was completely performed about October 1, 1910, and final settlement of said contract was made within the contemplation of the statute involved in this case between February 6th and February 10th, 1911.

(2). The Illinois Surety Company, one of the defendants herein, is liable in debt upon the bond sued upon for not to exceed \$31,047.18.

(3). The assignment by W. H. Schott to the Schott Engineering Company of the contract in question released the surety as to all materials sold and delivered by any of the for use plaintiffs after January 2, 1909, except in the case of the Racine Stone Company.

(4). The participation of the John Davis Company in the substitution of the new principal does not preclude that company from making a claim against the Illinois Surety Company.

(5). The acts of the John Davis Company, mentioned in the findings of fact, did not in any manner preclude it from claiming a liability against Schott, or against the Surety Company, either by way of equitable estoppel, ratification or otherwise.

(6). The Illinois Surety Company is liable upon the bond sued upon for all material delivered to W. H. Schott prior to January 2, 1909, to the persons and in the amounts following, together with interest at five per cent per annum thereon from the date of this suit, August 16, 1911:

186 The John Davis Company,	\$9,893.98,
The Universal Portland Cement Company,	1,000.00
The Standard Underground Cable Company,	2,563.16,
The Racine Stone Company,	113.28,
The Roebling Construction Company,	73.55.

(7). The Surety Company is liable for interest, as stated in the preceding conclusion, for the reason that the sums of money for which it was liable were definite and certain, although the question of the liability was uncertain.

26. The court erred in refusing to hold the following propositions of law, and each of them, tendered by the defendant, Illinois Surety Company, respecting the claim of the John Davis Company, one of the above named use plaintiffs:

(1) The court holds as a conclusion of law that under the facts found in the foregoing findings of fact the John Davis Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

(2) The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the John Davis Company against the Illinois Surety Company must be in favor of the Surety Company.

(3) The court holds, as a conclusion of law, from the evidence, that the John Davis Company cannot recover against the defendant, Illinois Surety Company.

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(4) The court holds as a conclusion of law that the participation of the John Davis Company in the substitution of the Schott Engineering Company as principal in the place and stead of Schott in the said Government contract of July 30, 1908, discharged the Illinois Surety Company of and from any and all liability to said John Davis Company.

(5) The acts of the John Davis Company in consenting to and participating in the substitution of the Schott Engineering Company as principal in said Government contract, as found by the court in its findings of fact, preclude the said John Davis Company from making any claim whatsoever against said defendant, Illinois Surety Company.

(6) The assignment of W. H. Schott to the Schott Engineering Company of the contract in question released and discharged the defendant, Illinois Surety Company, from any and all liability for materials sold either before or after said assignment, to any of the for use plaintiffs who consented to such assignment or who took any benefits thereunder.

188 (7) The court holds as a conclusion of law that the acts of the John Davis Company in consenting to and participating in the assignment of the contract in question by Schott to the Schott Engineering Company, and its subsequent dealings with the Schott Engineering Company in agreeing to and striking the balance of the account as found by the court and in filing its claim in bankruptcy as set forth in said findings of fact, discharged the defendant, Illinois Surety Company, from any liability to said John Davis Company.

(8) The court holds, as a conclusion of law, that a change or substitution of principals in a contract of the character of said Government contract of July 30, 1908, is a material alteration or change, which, if done without the consent of the surety, releases and discharges such surety in toto and not in part.

27. The court erred in refusing to hold the following propositions of law, and each of them, tendered by the defendant, Illinois Surety Company, respecting the claim of the Universal Portland Cement Company, one of the above named use plaintiffs:

(1) The court holds, as a conclusion of law, under the facts found in the foregoing findings of fact, that the
189 Universal Portland Cement Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

(2) The court holds, as a conclusion of law, from the facts

found in said findings of fact, that the judgment of the court on the claim of the Universal Portland Cement Company against the Illinois Surety Company must be favor of the Surety Company.

(3) The court holds, as a conclusion of law, from the evidence, that the Universal Portland Cement Company cannot recover against the defendant, Illinois Surety Company.

(4) The court holds, as a conclusion of law, that the Universal Portland Cement Company, in filing its claim in bankruptcy against the Schott Engineering Company, as set forth in the findings of fact of the court, is precluded from making any claim against the defendant, Illinois Surety Company.

(5) The court holds, as a conclusion of law, that the Universal Portland Cement Company, by filing its claim in bankruptcy against the Schott Engineering Company for the amount of its claim sought to be recovered in this case, sought to obtain an advantage and benefit under said assignment contract and thereby ratified the same, and cannot make any claim against the defendant, Illinois Surety Company.

190 28. The court erred in refusing to hold the following propositions of law, and each of them, tendered by the defendant, Illinois Surety Company, respecting the claim of the Standard Underground Cable Company, one of the above named use plaintiffs:

(1) The court holds, as a conclusion of law, that under the facts found in the foregoing findings of fact, the Standard Underground Cable Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

(2) The court holds, as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Standard Underground Cable Company against the Illinois Surety Company must be in favor of the Surety Company.

(3) The court holds, as a conclusion of law, from the facts, that the Standard Underground Cable Company cannot recover against the defendant, Illinois Surety Company.

(4) The court holds that inasmuch as the Standard Underground Cable Company sold material to the assignee of the contract in question, the Schott Engineering Company, after it had knowledge of said assignment and thereafter filed its claim in bank-
191 ruptcy against said Schott Engineering Company for the full amount of its claim made herein, that

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said Cable Company thereby took a benefit or advantage under said assignment and ratified the same and is now precluded as a matter of law from making any claim against said defendant Surety Company.

(5) The court holds that the Standard Underground Cable Company had the right to accept or reject the transaction by which the contract in question was assigned by Schott to the Schott Engineering Company, and the court further holds that having elected to take the benefits, that it, the said Cable Company, derived or anticipated that it would derive from the sale of material to the Schott Engineering Company in 1909 and the completion of said work by said Engineering Company, said Cable Company became bound by the assignment transaction and cannot avoid its effect or take any position inconsistent therewith; and cannot hold the said defendant Surety Company liable for materials sold either before or after the assignment.

(6) The court holds that inasmuch as the Standard Underground Cable Company took advantage of the assignment contract and sold material to the said assignee therein for said work it thereby ratified the substitution of the new principal in said contract, and by reason thereof the defendant, Illinois Surety Company, was and is discharged 192 from all liability to said Cable Company.

(7) The court holds as a conclusion of law from the facts that the Standard Underground Cable Company cannot recover against the defendant, Illinois Surety Company.

(8) The court holds, as a conclusion of law, from the facts found in said findings of fact that the judgment of the court on the claim of the Standard Underground Cable Company against the Illinois Surety Company must be in favor of the Surety Company.

29. The court erred in refusing to hold the following propositions of law, and each of them, tendered by the defendant, Illinois Surety Company, respecting the claim of the Roebling Construction Company, one of the above named use plaintiffs:

(1) The court holds, as a conclusion of law, under the facts found in the foregoing findings of fact, that the Roebling Construction Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

(2) The court holds, as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Roebling Construction Company

192 against the Illinois Surety Company must be in favor of the Surety Company.

30. The court erred in refusing to hold the following propositions of law, and each of them, tendered by the defendant, Illinois Surety Company, respecting the claim of the Racine Stone Company, one of the above named use plaintiffs:

(1) The court holds, as a conclusion of law, under the facts found in the foregoing findings of fact, that the Racine Stone Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

(2) The court holds, as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Racine Stone Company against the Illinois Surety Company must be in favor of the Surety Company.

(3) The court holds, as a conclusion of law, that the Racine Stone Company, in filing its claim in bankruptcy against the Schott Engineering Company, as set forth in the findings of fact of the court, is precluded from making any claim against the defendant, Illinois Surety Company.

31. The said District Court erred in entering judgment in favor of the said use plaintiff, John Davis Company.

32. The said District Court erred in entering judgment in favor of the said use plaintiff, Universal Portland Cement Company.

33. The said District Court erred in entering judgment in favor of the said use plaintiff, Standard Underground Cable Company.

34. The said District Court erred in entering judgment in favor of the said use plaintiff, Roebling Construction Company.

35. The said District Court erred in entering judgment in favor of the said use plaintiff, Racine Stone Company.

Wherefore, the defendant, Illinois Surety Company, prays that the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, in said cause, in favor of the United States of America, for the use and benefit of the John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and the Roebling Construction Company, and the judgment in favor of each of said use plaintiffs, be reversed, and that judgment be entered in this court in

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195 favor of the defendant, Illinois Surety Company, and for such other and further orders as justice may require.

HOPKINS, PEFFERS & HOPKINS,
*Attorneys for said defendant, Illinois
Surety Company.*

(Endorsed) Filed Feb., 6, 1914, T. C. MacMillan, Clerk.

er of Feb.
1914.

196 And on the same day to-wit: the sixth day of February 1914, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

197 IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

Friday, February 6, 1914,

Present:

Hon. A. L. Sanborn, District Judge.

United States of America, for the use
of James B. Clow & Sons, *et al.*,
Plaintiffs;

—vs—

Illinois Surety Company, and W. H.
Schott,
Defendants.

Gen. No. 30,486.
At Law.

Now; on this 6th day of February, A. D. 1914, came the said defendant, Illinois Surety Company, by its attorneys, and filed herein and presented to the court its petition, praying for the allowance of a writ of error from the judgment mentioned in its said petition, and an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon the said judgment against the said Illinois Surety Company herein so rendered may be sent to the United States Circuit Court of Appeals for the
198 Seventh Judicial Circuit, and that such other and further orders may be had as may be proper in the premises; on consideration whereof the court does herein allow the said defendant, Illinois Surety Company, the writ of error prayed for in said petition, and the said defendant, Illinois Surety Company, shall give a bond conditioned according to law in the penal sum of Seventeen Thousand Dollars, to be approved

by the Clerk of the court, which shall operate as a supersedeas bond.

A. L. SANBORN,
Judge.

213 United States }
of America: } ss.

Writ of error,
filed Feb. 6,
1914.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division, Greeting:

Because in a record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you or some of you, between the United States of America to the use of John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jesse B. Blackmer, executors of F. Bairstow, deceased; M. H. Hussey; Standard Underground Cable Company; George Racky; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; James P. Marsh & Company; Raymond Lead Company; George B. Carpenter & Company; Roebling Construction Company; Western Keiley Steam Specialty Company; H. W. Johns-Manville Company; Davies Supply Company; Racine Stone Company; Stebbins Hardware Company; Commonwealth-Edison Company; H. Channon Company;

214 Nancy M. Watrous, doing business as G. B. Watrous sons; James B. Clow & Sons; Scott Valve Company; Featherstone Foundry & Machine Company; Electric Appliance Company; Western Roofing & Supply Company; Charles A. Daniel, trading as Quaker City Rubber Company; and Moloney Electric Company, use plaintiffs, and the Illinois Surety Company and W. H. Schott, defendants, a manifest error hath happened, to the great damage of the said defendants, Illinois Surety Company, as by its complaint appears; we being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Seventh Circuit, together with this writ, so that you have the same in the United States Circuit Court

Writ of error,
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1914.

of Appeals for the Seventh Circuit at Chicago, Illinois, within thirty days from the date hereof, that the record and proceedings aforesaid be inspected, and said United States Circuit Court of Appeals for the Seventh Circuit may cause further to be done therein to correct that error, 215 what of right and according to the laws and customs of the United States should be done.

Witness,—the Honorable Edward Douglas White, Chief Justice of the United States, the sixth day of February, in the year of our Lord, One Thousand, Nine Hundred, fourteen.

T C MACMILLAN

*Clerk of the District Court of the United States
of America, for the Northern District of Illi-
nois, Eastern Division.*

The foregoing writ is allowed.

A L SANBORN

United States District Judge.

(Endorsed) 30,486 Writ of Error Filed Feb 6 1914 At
..... o'clockM. T. C. MacMillan Clerk

Bond on writ
of error, filed
Feb. 6, 1914.

199 And on the same day to-wit: the sixth day of February, 1914, come the Illinois Surety Company and filed in the Clerk's office of said Court its certain Bond on Writ of Error in words and figures following to-wit:

200 Know All Men by these Presents, That we, Illinois Surety Company, a corporation organized under the laws of the State of Illinois, as principal, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto the United States of America for the use and benefit of the John Davis Company; the Universal Portland Cement Company the Standard Underground Cable Company; the Roebling Construction Company and the Racine Stone Company, in the full and just sum of seventeen thousand dollars, (\$17,000.00) to be paid to the said United States of America for the use and benefit of said John Davis Company, the Universal Portland Cement Company; the Standard Underground Cable Company; the Roebling Construction Company and the Racine Stone Company, or its or their respective certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated

this sixth day of February in the year of our Lord one thousand nine hundred and fourteen.

Bond on writ
of error, filed
Feb. 6, 1915

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, and Eastern Division thereof, in a suit pending in said Court, between the United States of America for the use and benefit of the above named use plaintiffs and others plaintiffs, and said Illinois Surety Company and W. H. Schott, defendants a judgment was rendered against the said Illinois Surety Company, for the use and benefit of said John Davis Company; the Universal Portland Cement Company; the Standard Underground Cable Company; the Roebling Construction Company and the Racine Stone Company, on February 6th, 1914, and the said Illinois Surety Company, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said the John Davis Company; the Universal Portland Cement Company; the Standard Underground Cable Company; the Roebling Construction Company and the Racine Stone Company; citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Illinois Surety Company shall prosecute its writ to effect, and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

ILLINOIS SURETY COMPANY

By A. J. HOPKINS,

Its President. (Seal)

CHARLES E. SCHICK, (Seal)

Secretary

(Seal) UNITED STATES FIDELITY AND CASUALTY COMPANY,

By FRANK J. GAULTER,

Attorney in fact.

Approved by—

T. C. MacMILLAN,

Clerk, (Seal)

By JOHN H. R. JAMAR,

Deputy Clerk.

(Endorsed) Filed Feb. 6, 1914, T. C. MacMillan, Clerk.

der of Feb.
9, 1914.

201 And on the same day to-wit: the sixth day of February 1914, in the record of proceedings thereof in said entitled cause before the Hon. A. L. Sanborn, District Judge, appears the following entry to-wit:

202 IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

Friday, February 6, 1914,

Present: Hon. A. L. Sanborn, District Judge.

United States, for use of James B.	} No. 30486
Clow & Sons, <i>et al</i> ,	
<i>vs.</i>	
Illinois Surety Company and W. H. Schott.	

This matter coming on to be heard upon the motion of counsel for plaintiffs in error and for the for use plaintiffs in error and of counsel for the defendants in error, and it appearing to the court that notice of the suing out of a writ of error has been served both by counsel for plaintiffs in error and by counsel for defendants in error upon H. Channon Company, M. H. Hussey, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, Davies Supply Company, Featherstone Foundry & Machine Company and W. H. Schott upon the 6th day of February, 1914, and it further appearing that the above named parties have elected and decline to join in said writs of error, or either of them;

It Is Therefore Ordered that H. Channon Company, M. H. Hussey, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, Davies Supply Company, Featherstone Foundry & Machine Company and W. H.

Schott be, and they hereby are severed from said cause, 203 for the purpose of the prosecution by said Illinois Surety

Company of its said writ of error in said cause, and all of said last mentioned parties, except said W. H. Schott, are hereby severed from said cause for the purpose of the prosecution of their writ of error by the said United States and the remaining for use plaintiffs.

A. L. SANBORN,
Judge

February 6, 1914.

PRAECIPE.

Praeipce for
transcript
record, file
Feb. 11, 19

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

United States, for use of James B. Clow & Sons, <i>et al</i> , <i>vs.</i> Illinois Surety Company and W. H. Schott.	}	No. 30486
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In making up the record for the Circuit Court of Appeals, plaintiff in error, Illinois Surety Company, and plaintiffs in error, United States, for the use of The John Davis Company and others, request you to include in the record the following:

1. Declaration.
2. Claim of Charles A. Daniel.
3. Pleas of W. H. Schott filed November 24, 1911.
4. Demurrer of Illinois Surety Company filed November 7, 1911.
5. Order as to notice and publication entered April 24, 1912.
6. Order granting leave to amend declaration entered April 24, 1912.
7. Amendments to declaration, filed April 24, 1912.
8. Order directing that pleas of Schott stand to amended declaration entered May 4, 1912.
9. Demurrer of defendant filed May 2, 1912.
10. Demurrer of plaintiffs to pleas of Schott filed May 4, 1912.
11. Order overruling demurrer of Illinois Surety Company entered May 13, 1912.
12. Pleas of Illinois Surety Company to amended declaration filed May 22, 1912.
13. Demurrer to pleas filed May 27, 1912.
14. Order permitting Schott to file additional pleas entered June 20, 1912.
15. Pleas of Schott to amended declaration filed July 10, 1912.

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record, filed
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16. Demurrer of plaintiffs to pleas of Schott filed July 17, 1912.
17. Order disposing of demurrer to pleas entered July 22, 1912.
18. Order re demurrers to pleas of Schott and Illinois Surety Company entered November 14, 1912.
19. Additional pleas of Schott and Illinois Surety Company filed November 14, 1912.
20. Replication to pleas filed December 6, 1912.
21. Order increasing ad damnum entered May 20, 1913.
22. Amendment to original declaration filed May 20, 1913.
23. Order calling case for trial entered May 20, 1913.
24. Order overruling demurrer of plaintiffs to pleas of Schott entered May 22, 1913.
25. Order substituting Executors of Bairstow entered May 22, 1913.
26. Order discharging jury entered May 23, 1913.
27. Order overruling demurrers to Schott pleas entered November 12, 1913.
28. Findings of fact filed February 6, 1914. (Do not copy this, but note that it will be found in the Bill of Exceptions.)
- 206 29. Judgment entered February 6, 1914.
30. Petition of plaintiffs for writ of error filed February 6, 1914.
- 31.
32. Assignment of errors of plaintiffs filed February 6, 1914.
33. Order allowing writ of error entered February 6, 1914.
34. Writ of error issued February 6, 1914.
35. Citation and acceptance of service filed February 6, 1914.
36. Bill of exceptions filed February 6, 1914.
(Order entered in Circuit Court of Appeals, directing that original Bill of Exceptions be sent to Circuit Court of Appeals.)
37. Petition of Illinois Surety Company for writ of error filed February 6, 1914.
38. Assignment of errors of Illinois Surety Company filed February 6, 1914.
39. Order allowing writ of error of Illinois Surety Company, Bond \$17,000, entered February 6, 1914.
40. Bond of Illinois Surety Company filed February 6, 1914.

41. Writ of error issued on petition of Illinois Surety Company February 6, 1914.

42. Citation and acceptance of service on the petition of Illinois Surety Company filed February 6, 1914.

43. Orders of severance entered February 6, 1914.

207 44. Bond of plaintiffs in error filed February 6, 1914.

KNAPP AND CAMPBELL,

WYETH & SMITH,

GLENNON, CAREY, WALKER & HOWE, and

HOLT, CUTTING & SIDLEY,

Attorneys for United States, for use of

The John Davis Company and others.

HOPKINS, PEFFERS & HOPKINS,

Attorneys for Illinois Surety Company.

(Endorsed) Filed Feb. 11, 1914, T. C. MacMillan, Clerk.

*Praecepta for
transcript of
record, filed
Feb. 11, 1914.*

Certificate of
Clerk.208 Northern District of Illinois }
Eastern Division. } ss.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the proceedings had or record in the cause entitled United States of America, for the use of James B. Clow & Sons, et al. vs. Illinois Surety Company and W. H. Schott, made in accordance with Praecipe filed in this Court on the eleventh day of February, 1914, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this 16th day of February, 1914.

T. C. MacMILLAN,

(Seal)

*Clerk.*by JOHN H. R. JAMAR,
Deputy Clerk.

Bill of excep
tions.

1 United States District Court }
Northern District of Illinois }
Eastern Division. }

United States of America, for the use }
of James B. Clow & Son, *et al.* }
vs. }
Illinois Surety Company, and W. H. }
Schott. }

BILL OF EXCEPTIONS.

Be It Remembered that heretofore, to-wit, on May 20, A. D. 1913, the claims of the John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, United States Equipment Company, The Roebling Construction Company, The Western Kieley Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Racine Stone Company, Charles A. Daniel, Nancy M. Watrous, and Maloney Electric Company, came on for trial before the Honorable Judge Sanborn, one of the Judges of said Court, and a jury duly empaneled to try the issues joined herein.

2 Appearances:

Mr. W. D. McKenzie, and Mr. Ralph E. Church, representing John Davis Company, Universal Portland Cement Company, and Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased, Plaintiffs;

Messrs. Wyeth & Smith, representing Standard Underground Cable Company, George Racky, D. E. Garrison, United States Equipment Company, The Roebling Construction Company, The Western Kieley Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Common-

of excep-
ns.

wealth Edison Company, Scott Valve Company, Electric Appliance Company, Racine Stone Company, and Maloney Electric Company, Plaintiff;
Messrs. Glennon, Carey, Walker & Howe and Messrs. Wyeth & Smith, representing James B. Clow & Son, Plaintiffs;
Messrs. Holt, Cutting & Sidley and Mr. Allen, representing Western Roofing & Supply Company, Plaintiff;
Mr. McNitt and Messrs. Tenney, Coffeen, Harding & Sherman, representing Charles A. Daniel, Plaintiff;
Messrs. Hopkins, Peffers & Hopkins, representing the Illinois Surety Company, Defendant;
Messrs. Adams, Bobb & Adams, representing the defendant W. H. Schott.

3 Thereupon the said use plaintiffs, John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, United States Equipment Company, The Roebling Construction Company, The Western Kieley Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Racine Stone Company, Charles A. Daniel, Nancy M. Watrous, and Maloney Electric Company, to maintain the issues on their behalf, introduced the following evidence, and the following proceedings were had and taken with reference to the claims of said use plaintiffs, to-wit:

Mr McKenzie: The plaintiffs offer in evidence a copy of the contract dated July 30, 1908, between W. H. Schott, of the State of Illinois, party of the first part, and the United States of America, represented by the Secretary of the Navy, for the construction and installation at the United States Naval Training Station of the heating and electrical distributive mains and concrete tunnel, together with specification attached to that contract, and a copy of the bond given under that contract by W. H. Schott, as principal, and the Illinois Surety Company as surety, for the sum of \$31,047.18, dated August 3, 1908.

The Court: It may be received.

(Which said documents so offered and received in evidence

as aforesaid were thereupon marked Plaintiffs' Exhibit 1, and are in the words and figures following, to-wit:)

Plaintiffs' Exhibit 1—Bond

PLAINTIFFS' EXHIBIT 1.

Bond.

(Note. This form to be used when bond is given by a corporation authorized to act as sole surety. Certified copy of authority to act as sole surety, justification of surety, and financial statement to be attached.)

Know All Men By These Presents, That we, W. H. Schott, principal, and the Illinois Surety Company, a corporation created and existing under the laws of the State of Illinois as surety, are held and firmly bound unto The United States of America in the penal sum of Thirty One Thousand, Forty Seven Dollars & 18/100 (\$31047.18) dollars, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, assigns, and representatives, jointly and severally by these presents.

Signed, Sealed with our seals, and dated this 3rd day of August, A. D. 1908.

Conditions.

1. The condition of the above bond is such, that if the said above bounden principal,
2. W. H. Schott,
3. his or their heirs, successors, executors, or administrators, shall well and truly, and in a satisfactory manner,
4. fulfill and perform the stipulations of the contract hereto annexed, entered into with the
5. Secretary of the Navy, for and in behalf of the
6. United States, and shall conform in all respects to said contract, as it now exists or may be modified by
7. the parties hereto according to its terms, and to the plans and specifications attached thereto and forming a
8. part thereof, and to the satisfaction of the said Secretary of the Navy and shall promptly make
9. payments to all persons supplying him or them labor and materials in the prosecution of the work
10. provided for in the aforesaid contract, then this obliga-

Plaintiffs' Ex-
hibit 1—Bond.

- tion to be void and of no effect; otherwise to remain in
11. full force and virtue.

W. H. SCHOTT (L. S.)
ILLINOIS SURETY COMPANY (L. S.)
By F. M. BLOUNT (L. S.)
President.

- 5 Attest:

H. W. WATKINS, (L. S.)
Secretary.
..... (L. S.)

(Seal)

Note:—Words "Chief of the Bureau of Navigation, acting under the direction of the," on the 4th and 5th lines under "Conditions" and words "Chief of the Bureau of Navigation" on the 8th line, stricken out before signing and words "Secretary of the Navy" inserted on 8th line.

Signed, sealed, and delivered in the
Presence of—

JNO. D. HIBBARD
W. W. DURHAM.

Navy Department,
Office of the Solicitor,

August 5, 1908.

Respectfully submitted with the recommendation that this
bond be approved.

PITKENS NEAGLE,
Law Clerk,
For the Solicitor.

August 5, 1908,

Approved,

J. E. PILLSBURY,

Acting Secretary of the Navy.

Plaintiffs' Ex-
hibit 1—Con-
tract.

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PLAINTIFFS' EXHIBIT 1.

In Quadruplicate (—)
Contract No. 14

This Contract, of two parts, made and concluded this 30th day of July, 1908, by and between W. H. Schott, a citizen of the State of Illinois, having an office at #125 Monroe Street, Chicago, Illinois, party of the first part, and The United

ates, represented by the Secretary of the Navy, party of second part, Witnesseth:

Plaintiffs' Exhibit 1—Contract.

That for and in consideration of the payments to be made hereinafter specified the party of the first part, for himself and his heirs, executors and administrators, hereby covenants and agrees to and with the party of the second part as follows, that is to say:

First: The party of the first part will, at his own risk and expense, construct, provide, and install, at the U. S. Naval Training Station, Great Lakes, North Chicago, Illinois, heating and electrical distribution mains and concrete tunnels, furnishing all the necessary materials, labor, tools and appliances therefor, and will complete the same in all respects within six (6) calendar months from the date of this contract, all in conformity with the plans and specifications hereinafter said work, with the modifications thereof contemplated by paragraphs *d*, *e*, and *g*, of the addenda to said specifications; which said plans and specifications, including addenda to the contract, hereto appended, shall be deemed and taken as forming a part of this contract, with the like operation and effect as if they were incorporated herein:

And this contract further Witnesseth:

Second. That for and in consideration of the faithful performance of this contract by the party of the first part the party of the first part shall be paid, upon vouchers prepared, certified and approved in the usual manner and payable through such Navy Pay Office as the party of the second part may elect, the sum of one hundred and twenty-four thousand one hundred and eighty-eight dollars and seventy-three cents (\$124,188.73) payments to be made as prescribed in paragraphs thirty-nine and forty of the specifications heresaid.

Third. It is mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, officer of the Navy, or person holding any office or employment under the Navy Department, is or shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; that this contract shall not, nor shall any interest herein, be transferred by the party of the first part to any other person or persons, and that in the performance of this contract no persons shall be employed who are undergoing sentences of imprisonment at hard labor that have been imposed by courts

Plaintiffs' Exhibit 1—Contract.

of the several States, Territories, or municipalities, having criminal jurisdiction.

Fourth. The plans and specifications aforesaid shall not be changed in any respect when, the cost of such change in the execution of the work exceeds five hundred dollars (\$500.00), except upon the written order of the Secretary of the Navy.

Fifth. In the "General Provisions" of the specifications aforesaid the words "Chief of the Bureau of Navigation," or other words designating that officer, except in paragraph 54, shall be taken as meaning "party of the second part."

In Witness Whereof, the respective parties hereto have hereunto set their hands and seals the day and year first above written.

W. H. SCHOTT (Seal)

Signed and sealed in
the presence of:

A. E. DURAM

W. L. FOSTER

THE UNITED STATES,

By J. E. PILLSBURY,

As acting Secretary of the Navy.

PICKENS NEAGLE,

Law Clerk.

As to J. E. Pillsbury,

Acting Secretary of the Navy.

(Navy Department Seal)

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PLAINTIFFS EXHIBIT 1.

True Copy.

Proposals will be received at the Bureau of Navigation, Navy Department, Washington, D. C., until 12 o'clock noon, July 15, 1908, and there publicly opened immediately thereafter, for the Heating and Electrical Distribution Mains and Concrete Tunnel at the Naval Training Station, Great Lakes, near North Chicago, Ill. Blank forms of proposals and specifications will be furnished and plans may be procured upon application to the Commandant, Naval Training Station, Great Lakes, North Chicago, Ill.—J. E. Pillsbury, Chief of Bureau, June 4, 1908.

(Stamped across top): Please make invoices in triplicate.—
The triplicate copy without prices.

Plaintiffs' Exhibit 1—Specifications.

Specifications

For

Heating and Electrical Distribution Mains
and Concrete Tunnel for the

U. S. Naval Training Station, Great Lakes, Near North
Chicago, Ill.,

Under Appropriation

“Naval Training Station, Great Lakes, Buildings.”

Act approved March 2, 1907.

Instructions to Bidders.

1. Proposals will be received as follows:

Item 1.—Price for furnishing all material and labor and for constructing, installing, and testing of the following distributing systems, complete, with all apparatus and appurtenances necessary thereto: Hot-water heating system; steam-supply and vacuum-return system; electric light and power mains. With bid under this item there shall be submitted the following data and plans: (a) Manufacturer's name and type of gate valves submitted, with cuts and specifications calling particular attention to any details differing from the provisions described hereinafter; (b) same for all other valves; (c) same for expansion joints, supports, and anchors; (d) same for traps and receivers; (e) same for gauges and thermometers; (f) same for junction boxes, fuse boxes, switches, fuses, cables, conduit, and other electrical supplies; (g) same for transformers. In order to prevent confusion, bidders are requested to file and label all plans and specifications submitted, in accordance with the above-outlined notation.

Item 2.—If a shorter time for completion than that required by paragraph 24 of this specification can be guaranteed, or if a longer time is required, bidders may submit under this item the time for completion upon which their propositions are based. The time of completion will be considered in awarding the contract.

Item 3.—The bidder's attention is invited to the list of pos-

Artists' Ex-
hibit 1—Spe-
cifications.

sible changes given in the addenda to these specifications. These items should be carefully figured, as the Government may award the contract with any number of these changes included.

2. Location.—The mains to be installed will be located at the U. S. Naval Training Station, Great Lakes, situated 32 miles north of Chicago and 1 mile south of North Chicago, Ill. There is a spur track from the Chicago and Northwestern Railroad and from the Chicago and Milwaukee Electric Railway to the end of the bluff above the site of the power house. Also, there is a spur track into the receiving plateau.

3. Each proposal must be accompanied by evidence of the fact that the bidder is practically engaged in performing work of the kind required, that he has performed acceptably work of like character, and that he is able to furnish the material and perform the work for which he bids.

4. Each proposal must also be accompanied by a certified check, in a sum equal to 3 per cent of the amount of the proposal, made payable to the Chief of the Bureau of Navigation. This check shall be forfeited to the United States if the bidder shall fail, within twenty days after the receipt of a notice of acceptance of his proposal, to execute the required contract and give bond, with satisfactory surety, in a penal sum equal to 25 per cent of the contract price, conditioned upon the faithful performance of the contract. Checks of unsuccessful bidders will be returned to them immediately on the awarding of the contract. The check of the successful bidder will be returned to him immediately upon the execution of the contract. No bond is required with the proposal.

5. Before making his proposal the bidder should carefully examine the drawings, plans, the entire contents of this specification prepared for the work, and the form of contract, also the site of the proposed work, so as to make himself thoroughly familiar with all the requirements.

6. Plans and specifications may be seen at the Bureau of Navigation, Navy Department, Washington, D. C., or may be obtained upon application to the Commandant, Naval Training Station, Great Lakes, North Chicago, Ill.

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7. The United States will not be responsible in any manner for verbal answers given to any inquiries regarding

the meaning of drawings or specification, or for any verbal instructions given by employees or others in advance of the awarding of the contract.

Plaintiffs' Exhibit 1—Specifications.

8. Proposals and all exhibits, alternate plans, letters of explanation, circulars, and all other papers (except the certified check) which it is desired to have considered in connection herewith must be made in duplicate. All proposals shall be made out on the proper blanks, which will be provided to the bidder upon application to the Commandant of the Naval Training Station, Great Lakes, North Chicago, Ill. All prices or sums of money shall be stated in words and in figures. Proposals must be inclosed in a plain envelope, sealed and distinctly marked on the outside with the bidder's name and address, and indorsed "Proposal for Distribution Mains, Naval Training Station, Great Lakes, North Chicago, Ill." The plain envelope, marked as above, to be inclosed in a mailing envelope addressed to the Chief of the Bureau of Navigation, Navy Department, Washington, D. C. Proposals must be signed by the bidder submitting them, with his usual signature in full. When a firm is the bidder, the member of the firm, or agent, who signs the firm name in the proposal shall state in addition all persons composing the firm. Anyone signing a proposal as agent of another, or of others, must file with it legal evidence of his authority to do so.

9. Each bidder must fulfill all the requirements in these instructions relating to the filing of proposals, whether found in this section of the specifications or elsewhere; the failure of the bidder to comply fully with all such requirements shall be sufficient cause for the rejection of his proposal.

10. The Government reserves the right to waive defects and informalities in proposals, to reject the proposals of any failing or defaulting contractor, to reject any and all proposals, or to accept any proposal, as may be deemed to its interest.

11. Bids received after the time of closing, i. e., 12 o'clock noon of the day appointed in the advertisement inviting proposals, will not be considered.

General Provisions.

12. Intention.—It is the declared and acknowledged intention and meaning to provide and install complete all tunnels, conduit, piping, valves, lagging, wiring, transformers, expansion

Plaintiffs' Exhibit 1—Specifications.

tank, and all other apparatus and framing necessary for the safe, efficient, and economical distribution of heat, light, and power, to the buildings at this Station. This distribution system to include tunnels; manholes; valve-boxes; drains; hangers; brackets, and necessary supports and framing; wood trestle; steam, vacuum, hot-water relief, drip, blow-off and other piping; expansion tank; all valves; gauges, thermometers; traps; vacuum lifts; expansion joints; pipe coverings; all electrical conduit; cables wires junction boxes; hand-hole and pull boxes; all fuse and cut-out boxes; transformers; switches; outlet boxes; lamps; and all other apparatus, fixtures, fittings and framing, shown or required for the complete installation and operation of these distributing mains.

13. General description.—There will be a forced circulation hot-water system for supplying heat for direct radiation in buildings. The supply will leave power house with a pressure head available for friction of about 100 feet normal, and 160 feet maximum; pipes will be carried in tunnel as shown; mains have been calculated so that under usual conditions all return mains will have same pressure at end of tunnel. The volumetric expansion of the water will be taken care of by an open tank, which will contain float valve, in tower of Administration Building; the system will be filled both through this tank and power pumps in boiler room.

The arrangement of the hot-water mains is based on the Evans-Almirall system.

The steam system will supply indirect radiation, domestic hot-water heaters, disinfecting chamber, cookers, etc., in buildings. The steam in mains will leave power house at 125 pounds pressure. The condensation from steam apparatus, cookers, etc., is to be returned to power plant by vacuum return system.

The electrical distribution system will supply three phase, 60 cycle, 2,300 volts, alternating current to transformers, the secondaries of which will supply 230 volts to motors and 115 volts for lighting service in buildings. All primary conductors, cut-outs, transformers, secondary leads to buildings and lamps for tunnel are in this contract.

This contract will begin with connection to mains, brought just outside power house wall by others, and will include connections to building mains at building walls. No portion of systems in power house is included in this contract. No radiation, heaters, cookers or disinfecting plant in buildings is included in this contract. The vacuum return valves used in

the buildings are the Van Auken valves. The contract, plans and specifications of buildings, bridges, and power plant equipment may be examined at the Naval Training Station.

14. Character of the work and materials.—All work as hereinafter described or shown on the drawings, and any work necessary to the thorough completion of the work so described or shown, is to be executed in the most workmanlike manner, and where work and materials are not specially mentioned they are to be of the highest grade and best adapted to the purpose. All materials to be the best of their respective kinds, in ample quantities.

15. Defective work or material.—Any material delivered or work performed not in accordance with the drawings and these specifications must be removed at the contractor's expense and replaced with other material or work, satisfactory to the officer in charge, at any time during the progress of the work. Or, in case the nature of the defect shall be such that it is not expedient to have it corrected, the United States shall have the right to deduct such sums of money as the officer in charge may consider a proper equivalent for the difference in value of the materials or work from that specified, or for the damage done to the work, from the amount due the contractor on the final settlement of accounts. Invoices of all materials delivered at the site for this work are to be filed on the date of delivery of material with the officer in charge.

16. Examination of work.—Should it be deemed advisable by the officer in charge of the work to make an examination of any work already completed by removing or tearing out the same the contractor shall furnish all necessary facilities, labor, and materials. If the work be found defective in any respect, due to the fault of the contractor, he shall defray all costs of said examination and satisfactory reconstruction. If the work be found perfect, such actual cost will be allowed the contractor.

17. Omissions and misdescriptions.—Specifications and drawings are intended to cooperate, and any work exhibited on the drawings and not mentioned in the specifications, or vice versa, is to be executed as if both mentioned in the specifications and shown on the drawings, to the true meaning and intention of said drawings and specifications. The omission from the contract, or from the plans, specifications, or other papers attached thereto and forming a part thereof, or the misdescription of any details of work the proper performance

Plaintiffs' Ex-
hibit 1—Spe-
cifications.

of which is necessary to fully carry out the intention above expressed, shall not operate to release the contractor from performing such work, but the same shall be fully and properly performed in the same manner as though fully and correctly shown, described, and required in the contract, and without expense to the United States in addition to the contract price.

18. Discrepancies.—Should any discrepancy exist between the plans and specifications, or any parts of either, or should the language of any part of the contract or specifications be ambiguous or doubtful, the officer in charge of the work shall decide as to the true intent and meaning as provided in paragraph 33; and all questions concerning the work which require a decision will be referred by the contractor as above provided.

19. Changes.—The United States reserves the right to make such changes in the contract, plans and specifications as may be deemed necessary or advisable, and the contractor agrees to proceed with such changes as may be directed in writing by the party of the second part. The cost of said changes shall be estimated by the officer in charge and if less than (\$500.00) five hundred dollars, shall be ascertained by him. If the cost of said changes is five hundred dollars (\$500.00) or more as estimated by the officer in charge, the same shall be ascertained by a board of not fewer than three officers or other representatives of the United States, to be appointed under the party of the second part. The cost of changes as ascertained above shall, when approved by the party of the second part, be added to or deducted from the contract price and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract; Provided, that the increased cost shall be the estimated actual cost to the contractor at the time of such estimate and that the decreased cost shall be the actual or market value at the time the contract is made, both plus a profit of ten per centum.

20. Verbal modifications.—It is distinctly understood that no verbal statement of any person whomsoever shall be allowed in any manner or degree to modify or otherwise affect the terms of this specification or of the contract for the work. Changes shall be made only and strictly according to paragraph 19.

21. Extras.—The contract price shall cover all expenses,

of whatever nature or description, connected with the work to be done under the contract. No allowance whatever will be made for additional or extra work or material except under the provisions of paragraph 19.

23. Time of commencement of work.—The contractor shall commence work within ten days after the execution of the contract and continue without interruption unless otherwise directed by the United States by its officer in charge of the work or other authorized representative, or as otherwise hereinafter provided.

24. Time of completion of work.—The entire work shall be completed in every respect and particular within six calendar months from the date of the contract.

25. Delays and suspensions.—The United States reserves the right to reasonably delay the commencement of the work and to suspend operations at any time and for any period. Should such delay or suspension cause a change in the cost of the work, such change shall be determined as provided in paragraph 19.

26. Progress of work.—If at any time the progress of the work shall, in the opinion of the Commandant, appear to have been such as to indicate that the work is not likely to be completed within the time allowed, he shall report such opinion to the Chief of the Bureau of Navigation, who may, in his discretion, declare the contract null and void, without prejudice to the right of the United States to recover for defaults thereon or violations thereof.

27. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the Chief of the Bureau of Navigation under paragraph 28 of these general conditions, it is distinctly understood and agreed that deductions at the rate of \$25 per day as liquidated damages shall be made from the contract price for each and every calendar day after and exclusive of the date within which the completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the completion of the work; and the contractor agrees and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract.

28. Extensions of time.—Extensions of time for the com-

Artists' Ex-
hibit 1—Spe-
cifications.

pletion of the work may be allowed and made, in writing, by the Chief of the Bureau of Navigation. Any and every extension of time must be specifically made and shall not be implied from any cause under any circumstances.

29. Continuance of work after time.—It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract said work shall continue to be carried on according to all the provisions of said contract, plans, and specifications, unless otherwise at any time directed by the party of the second part in writing,

and said contract shall be and remain in full force and effect during the continuance and until the completion of said work unless sooner revoked or annulled according to its terms; provided that neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the party of the second part of its right to annul or terminate said contract for abandonment or failure to complete within the time specified in paragraph 24 or to impose and deduct damages as provided in paragraph 27.

30. Unavoidable delays.—Unavoidable delays are such as result from causes which are undoubtedly, or may reasonably be presumed to be, beyond the control of the contractor, such as acts of Providence, unusual storms, fires (not the result of negligence), fortuitous events, inevitable accidents, etc. Should the progress of the work be, or seem to be, delayed at any time by such causes, the contractor shall at once notify the officer in charge, in writing, of the occurrence, in order that a record of the same may be made. Should it be decided that the delay was unavoidable, a corresponding extension of time for the completion of the work may be allowed, but it is distinctly understood that should the contractor fail or neglect to notify the officer in charge as above provided such omission shall be construed as a waiver of all claim and right to an extension of time for the completion of the work on account of such delay.

31. Avoidable delays.—Avoidable delays are such as result from causes which the contractor might by care, prudence, or foresight have guarded against or prevented. No extension of time shall be allowed on account of such delays.

32. Annulment of contract.—Should the contract for any reason be declared null and void the contractor shall thereupon

become indebted to the United States as for ascertained and liquidated damages in a sum equal to the aggregate of all payments made to him on account of the contract, and undertakes and promises to refund the same to the United States on demand. And the contractor further agrees that the United States may hold all material delivered and work done under the contract and all machinery, tools, appliances, etc., upon the site of the work, or used in connection therewith, pending the completion of the work covered by the contract. Upon the annulment of the contract a board of officers, or other representatives of the United States, shall be appointed, which shall ascertain and determine the value of all material delivered and work done, including a fair and reasonable margin of profit thereon, and upon approval of the findings of said board by the Chief of the Bureau of Navigation, he may proceed to complete the work according to the contract, and in such manner and by such means as he may deem advisable, and may, in his discretion, use or employ any material, tools, machinery, appliances, etc., belonging to or furnished by the contractor for use in connection with the work covered by the contract. Upon the completion of the work, should the total cost thereof exceed the contract price, the difference shall be charged to the contractor, who undertakes and promises to pay the same upon demand. Should the total cost of the work be less than the contract price, the contractor shall be entitled to receive the amount found by the board above mentioned to be the value of material delivered and work done by the contractor, less previous payment to him and the appraised value of materials not used in completing the work, Provided, that no allowance shall be made for profit which the contractor might have made by completing the work or for any excess of the contract price over the total cost of the work.

33. Control of work.—The United States, by its officer or agent in charge of the work, or other authorized representative, shall at all times have full control and direction of all work under the contract; such officer in charge, by virtue of the general supervision and customary authority invested in him, or his authorized representatives, shall at all times have free access to the work and to the shops of the contractor for inspection of the work or any part thereof. All questions, disputes, or differences as to any part or detail of the work shall be decided by the Commandant, subject only to appeal to the Chief of the Bureau of Navigation.

Contractors' Ex-
hibit 1—Spec-
ifications.

34. Contractor's responsibility.—The contractor shall be responsible for the entire work and every part thereof, and for all materials, tools, appliances, and property of every description used in connection therewith. He shall specifically and distinctly assume, and does so assume, all risks of damage or injury from any cause to property or persons used or employed on or in connection with the work, and of all damage or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the United States against all claims on account of such damage or injury.

35. Contractor's supervision.—All work, of every character and description, is to be laid out on the site or otherwise by the contractor, who will be held responsible for its correctness; and no plea as to the acts, orders, directions, or supervision of the officer in charge, or any other person, shall be admitted in justification of any errors of construction or departure from the terms of the contract unless such orders or directions were explicitly given in writing by the officer in charge.

36. The contractor shall give his personal attention to the work at all times, and shall be present, either in person or by duly authorized representative, on the site of the work continually during its progress, to receive the directions or instructions from the officer in charge.

37. Employees.—The contractor shall employ only competent, careful, orderly persons upon the work, and if, at any time, it shall appear to the officer in charge that any person employed on the work is incompetent, careless, reckless, or disorderly, or disobeys or evades orders or instructions, or shirks his duty, such person shall be immediately discharged from and not again employed upon the work. The Commandant shall have the right to demand the withdrawal of any person connected with the work whenever, in his judgment, the best interests of the Government require it; and the contractor agrees to withdraw, and not again employ, such person on the work upon the demand of the Commandant, made in writing.

38. Schedule of prices.—Previous to the first monthly payment the contractor shall submit a schedule of prices covering the quantities and unit costs of all material furnished f. o. b., and worked into place, also all machinery and apparatus de-

livered and cost of erection, also all piping of various sizes delivered and erected, also all pipe covering of various sizes and lagging, valves, steel work, concrete, wiring and conduit work, etc., and the extension of quantities of material and apparatus times the cost of material delivered plus the 12 cost of erection must total to the lump sum contract price.

This schedule of prices shall, upon approval by the Commandant, be used as a basis for monthly payments during the progress of the work. The Commandant reserves the right to increase or decrease the schedule of unit prices at any time, which changes shall not change the contract price.

39. Payments.—Payments will be made by the Navy Dept. monthly, upon public bills, based on monthly estimates and the schedule of unit prices above described, certified by the officer in charge and approved by the Commandant and the Chief of the Bureau of Navy. Ten per cent (10%) of the amount of each monthly estimate will be withheld until the completion and acceptance of the work. One half the amount of the reservations this withheld will then be paid upon public bills certified and approved as above, the remaining one half of said reservations to be so paid at the expiration of one year from the time of the completion and acceptance of the work, subject however, to the provisions of Paragraph 56—of these specifications.

40. All warrants for payments under the contract shall be made payable to the contractor or his order at such Navy Pay Office as the party of the second part may designate. Before final payment under the contract, and as a condition precedent to such payment, the contractor shall execute and deliver to the party of the second part, a full and final release to the United States, in such tenor and form as shall be approved by the Secretary of the Navy, of all claims of any kind or description or under or by virtue of the contract.

41. The monthly payments on the work during its progress shall not be considered or understood to be a final acceptance of the work in question, and any work or material which is of an inferior quality, or proves unsatisfactory in any respect, at any time, shall be rejected and replaced by the contractor to the satisfaction of the officer in charge of the work, notwithstanding that payments have been made upon such work or material.

42. Patents.—The contractor shall forever protect and defend the United States in the full and free use and enjoyment

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of any and all rights to any invention, machine, or device which may be applied as part of the work, either in its construction or use after completion, against the demands of all persons whomsoever.

43. Guards, lights, etc.—The contractor shall provide, during the progress of the work, all guards, lights, etc., for the protection and convenience of the public as required by local laws or police regulation or as may be directed by the officer in charge. The contractor shall provide and maintain crossings and bridges over his trench when so directed by the officer in charge. Crossings shall be maintained at all intersections with tracks, roads, sidewalks, and at intermediate points as directed.

44. Watchman.—The contractor is to have charge of and watch the work from the time work is started on the premises until the completion and delivery of the work to the Government. He is to keep a watchman on the grounds at all times. This article is not to be construed as in any measure abridging or restricting the right of the United States to exercise supervision and control, through its proper officer, over all property within the limits of the Government reservation.

45. Guaranty.—The contractor shall guarantee all work and materials and keep same in perfect repair and condition for a period of one year after the completion and acceptance, unless hereinafter, or in the contract, otherwise stipulated. Defects of any kind appearing during that period must be made good by the contractor at his expense when called upon to do so, and all to the entire satisfaction of the Commandant. All work must be in perfect condition at the end of the period above named.

46. Cleaning.—The contractor shall, from time to time, when so directed, clean up and remove from the Government reservation all refuse material and rubbish arising from the work, and at the final completion of the work leave same in a clean and perfect condition.

47. Laws, regulations, and permits.—The contractor is to comply with all the naval, municipal, or corporation ordinances and laws relating to buildings or work in the Government grounds, also all regulations governing the grounds as to the use of drives, gates, etc., and he must strictly conform to the boundary lines given by the officer in charge. He is to

tain all necessary permits and licenses, and pay all costs and fees for same.

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48. Water.—The contractor is to provide and pay for all water required and used in the construction of the work under his contract. Water may be obtained from station mains by arrangement with other contractors.

49. Samples.—Duplicate samples of materials to be used in the fulfilling of the requirements of these specifications shall be deposited as long as possible prior to their use in the work, with the officer in charge, such samples to be numbered in duplicate for convenience of reference.

50. Tests.—All tests of material will be made by the Government unless otherwise specially provided in these specifications. In no case will the use of materials be permitted until a full test is completed and they are found to meet the specifications in all respects.

51. Risks.—The contractor shall assume, without additional compensation, all risk from storms, fire, flood, damage to person and property, and casualties of every description, and maintain the work at his own risk from the time he first starts work on same until its final acceptance.

52. Eight-hour law.—The attention of the contractor is called to the act of Congress, approved August 1, 1892, limiting the hours of daily service of laborers and mechanics employed on public works of the United States to eight hours in any one calendar day. Any violation of this law noted by the inspector shall be reported to the Department for such action as may be deemed advisable by the Department of Justice.

53. Layout of work.—A plan of the premises showing the exact location of the work and its levels will be furnished by the Government. Base lines are laid out and bench marks set in the Naval Training Station grounds for the convenience of the contractor, who will lay out his working lines and levels from the base lines and bench marks given. The contractor shall cooperate with the officer in charge in the preservation of all marks and monuments.

54. Insurance.—The machinery and all materials and appliances which may be damaged by fire, storms, or other causes, and which are provided and used, or to be used in the construction and installation of this work, shall be insured, when directed by the Commandant, which insurance shall be renewed and increased from time to time to the full value of the monthly payments on the material insured, including the

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10 per cent reservation, and such insurance shall be at the expense of the contractor. The loss, if any, to be stated in the policy, or policies, as payable to the Chief of the Bureau of Navigation, Navy Department, Washington, D. C. The insurance to be effected in such manner, and in such companies as shall be approved by the Chief of the Bureau of Navigation.

55. Materials, etc.—The contractor shall provide at his own expense all manner of materials, labor, tools, implements, transportation, and cartage, etc., together with all necessary power and attendance, for the complete execution of this contract.

56. Reservation.—One-half of the 10 per cent reservation hereinbefore provided to be made on all payments will be held for a period of one year after the completion and acceptance of the work. And the contractor agrees that should he fail to make necessary repairs the same may be done by the Government at his expense.

57. Subcontractors.—Subcontractors must be approved by the officer in charge before any part of the work is sublet, the contractor being held responsible for any acts or omissions of such subcontractors.

58. Facilities.—The contractor will be allowed reasonable space at the site of the work and access to the same for receiving, handling, storing, and working material, but he shall confine both employees and material to the space assigned.

59. Privies.—Provide and set up, where directed, and inclose against the weather and from view, a suitable number of privies of approved size and construction for the use of the employees on the work, and see that their use is observed. Keep them in good condition, and disinfect in such manner and at such times as directed, and on the completion of the work remove them from the premises, leaving all clean and free from nuisance.

Special Provisions.

60. Plans.—Twelve sheets of plans, marked C-1 to C-12, inclusive, accompany this specification. These specifications and the accompanying plans shall be considered as supplementary one to the other, so that materials and workmanship shown, called for, or implied by the one and not by the other shall be supplied and worked into place the same as though specifically called for by both. All detail plans that may be

furnished subsequently in further amplification, as well as all instructions given by the officer in charge that may be necessary to indicate more fully the intention of the specification and the above-mentioned plan, shall be followed and considered as though forming a part of the original contract. For all portions of the work the contractor shall submit the necessary detail plans to the officer in charge for approval, unless otherwise directed by him, before proceeding with the work. These details shall conform to the letter and spirit of the specification, to any supplementary data and instructions, and to the general and detail plans already furnished to the contractor. Plans shall be submitted to the officer in charge in the form of tracings, or the equivalent as regards facility for blueprinting. These will be returned to the contractor, either with blueprints of same stamped "approved" or to be revised as directed. In the latter case the necessary corrections shall be made and the revised drawings submitted before proceeding with the work. Approval of plans will be of a general nature and will not relieve the contractor from errors or omissions that may exist therein. Previous to the acceptance of the work one complete set of tracings, in accordance with the actual work, of all plans required of the contractor, if any, shall be furnished to the Bureau of Navigation.

61. Checking plans and dimensions; lines and levels.—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the officer in charge of any discrepancies discovered therein. Figures marked on plans shall, in general, be followed in preference to scale measurements, but the contractor shall compare all plans and verify the figures before laying out the work and will be held responsible for any errors therein that might have been avoided. In all cases where dimensions are governed by conditions already established the contractor must depend entirely upon measurements taken by himself, scale or figured dimensions to the contrary notwithstanding; but no deviation from the specified dimensions will be allowed unless authorized by the officer in charge. The contractor will be held responsible for the lines and levels of his work, which he shall lay out himself, and he must combine all materials properly.

62. Inspection. The contractor must afford every facility necessary for the safe and convenient inspection of the work throughout its construction. The officer in charge shall have power to reject material and workmanship which are not in

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accordance with the contract, and all such must be removed promptly by the contractor and replaced to the satisfaction of the officer in charge without extra expense to the Government. Provisional acceptance in the course of construction shall not preclude rejection upon the discovery of defects previous to the acceptance of the completed work. All inspection of material and workmanship will be made, unless otherwise stated herein, after delivery at the site.

63. Other work on station.—The contractor will be required to carry on his work without interfering with the ordinary use of the streets or with the operations of other contractors or delaying or hindering any work done by the Government, whether upon the site or not. He shall make good any damage to Government property caused by his operations. It is understood and agreed that the Government and the contractor will, so far as possible, labor to mutual advantage where their several works in the above-mentioned or in unforeseen instances touch upon or interfere with each other.

Mutual concessions under the direction of the officer in charge shall be made to secure this end. Any disputes arising as to division of work, where work done under this contract touches or interferes with work done under other contracts, shall be adjusted by the contractors affected and the officer in charge, and in case of disagreement between the contractors the decision of the officer in charge shall be final. It is also further understood and agreed that from any such necessary interference, whether resulting in delay or additional expense or not, no claim for extra compensation shall arise, the contract price covering all contingencies of every kind, except for changes provided for in paragraph 19 of this specification.

64. Most of the buildings shown on plans are in course of construction. The contract for railroad trestle to power house will probably be let in July, 1908. Contract for power-plant equipment was awarded in May, 1908. The sewers and drains are being installed. The Four Officers' Quarters at south, that are noted on plans as being "under construction" are practically completed. The water-supply mains are completed. Construction of Mess Hall and galley will begin on June 1, 1908. Sheet C-11 of plans shows division of work to be done by this contractor and building contractor where tunnel enters Mess Hall. Contractor for railroad trestle from bluff to power house will provide a continuation of tunnel

from bridge abutment to building wall. This will be a wooden-box conduit, 6 feet wide by 6 feet high and will be on a steel framework. This contractor will carry pipes and wires through and make connections to pipes and wires brought to a point outside power-house wall.

65. Openings in foundation walls.—In general, connections to house piping is made where mains are left by building contractor outside of foundation walls. In some cases, however, connection will be made inside of walls, and in some cases this contract calls for mains to pass through buildings. Openings will be left in Mess Hall foundation walls for tunnel, and in general openings are left wherever the foundation walls were not constructed before distributing main plans were laid out. There are about a dozen or more cases, however, where it was impossible to leave these openings, and this contractor shall do all the cutting, enlarging, fitting, repairing, and closing, etc., of all new and old openings necessary to properly install and complete this work. The bidder should make a personal examination of all foundations now under way to satisfy himself as to how much cutting, etc., will be required.

66. Interferences.—This contractor shall take out and replace in an approved manner all water, sewer, and drain mains which interfere with this contract. Where sewers and drains are carried across tunnel and are unsupported, they must be changed to cast-iron pipe. In general, such mains as must be moved are so noted on the profile of tunnel, which shows all pipes passing through tunnel. This contractor must take care of and do all work required to correct any interferences which arise from other installations. The elevations of water, sewer, and drain mains given on plans are closely approximate, but are not guaranteed. The contractor may obtain plans of these systems at the Naval Station.

67. Guaranty of equipment and pipe sizes.—This contractor may increase any sizes necessary to guarantee systems. Power plant apparatus plans and building plans showing equipment may be seen at the station. This contractor shall guarantee and be responsible that water-main sizes and workmanship will deliver the required amounts of hot water needed to the various buildings under the pressures given by pumps described in the power-plant specifications. He shall guarantee that steam sizes and workmanship will deliver the required amounts of steam to the various buildings with a pres-

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sure drop of 100 pounds under ordinary maximum draft conditions, and shall guarantee the vacuum return main sizes and workmanship to maintain a vacuum to all building apparatus with the size of pump specified in the power-plant specifications. The contractor shall guarantee all apparatus installed to properly perform its functions and shall guarantee all material and workmanship in this entire contract for a period of one year, as covered in the general clauses of this specification.

68. Supports over filled ground.—Wherever mains run over filled (original contours on 5-foot intervals as shown on plans) the mains shall be supported by brackets on building foundation walls spaced about 5 feet apart, or held in other approved manner against settling and movement.

Materials.

69. Quality.—All materials and workmanship shall be of the best quality of their respective kinds when the grade is not specifically mentioned, and the acceptance of same is understood and agreed to be subject to the approval of the officer in charge.

70. Drainpipe.—All pipe and specials, unless otherwise specified, shall be of the best quality, salt-glazed, vitrified-clay sewer pipe of the hub and spigot pattern; both body and bell shall have a thickness not less than that permitted by the following table. Each hub shall be of sufficient diameter to receive, to its full depth, the spigot end of the next following pipe or special without any chipping whatever of either, and also leave an annular space equal to that given in the following table for cement mortar joint. The depth of hub shall not be less than that specified. Straight and curved pipe shall be furnished in standard lengths. Branches to be in 2-foot lengths. All pipe and specials shall be sound and well burned, with a clear ring, well-glazed and smooth on the inside and free from broken blisters, lumps, or flakes which are thicker than one-sixth the nominal thickness of the pipe, and whose largest diameters are greater than one-eighth the inner diameter of said pipe; and pipes having broken blisters, lumps, or flakes of size specified shall be rejected, unless the pipe can be so laid as to bring all of these defects in the top half of the drain. Pipes or specials having fire checks longer

than as specified, or having fire checks or cracks of any kind extending through the thickness, shall be rejected.

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71. The accompanying table gives maximum permissible variations in alignment for 2½ foot lengths of pipe, maximum variations in thickness of shell, and maximum variations of two diameters.

72. Pipe shall be No. 1 quality, and any pipe or special which betrays in any manner a want of thorough vitrification or fusion, or the use of improper or insufficient materials or methods in its manufacture, shall be rejected.

73. Table of vitrified-pipe sizes:

Inside diameter of pipe.	3".	4".	5".	6".	8".
Minimum thickness of shell.....	½	½	⅝	⅝	¾
Minimum depth of socket.....	1½	1¾	1¾	1¾	2
Maximum variation in alignment for 2½' length.	⅜	⅜	⅜	⅜	⅜
Maximum difference in two diameters.....	¼	¼	¼	¼	¼
Maximum variation in thickness of shell.....	⅛	⅛	⅛	⅛	⅛
Maximum length of fire cracks.....	1	1	1	1	1½
Annular space	¼	¼	⅜	⅜	⅜

All of above dimensions are given in inches.

74. Farm or open tile drains.—Farm tile for under drains will be an approved well-burned porous clay tile, laid with butt joints, not cemented. Tile will be surrounded and covered with a 2-inch layer of gravel. The minimum permissible grade for tile will be one-half of 1 per cent.

75. Cast-iron pipe.—All cast-iron pipe required for changing location of water-supply mains, already in place, shall be of the bell-and-spigot pattern. The thickness of material and weights for pipe shall be as per the following table:

Internal diameter.	Thickness.	Per length.
6 inches.	0.51 inch.	435 pounds.
8 inches.	0.56 inch.	637 pounds.
10 inches.	0.62 inch.	871 pounds.
12 inches.	0.68 inch.	1,135 pounds.

Cast-iron pipe for replacing such sewers and drains as must be moved shall be heavy drain pipe size and weight. Pipe shall be cast to lay 12 feet per length. No pipe will be accepted which weighs less than 96 per cent of the weight specified, nor which shall have a smaller internal diameter than that specified. Thickness in table is for pipe without coating, and no pipe will be accepted where the thickness in

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any part is more than 1/16 inch less than as specified. All pipes shall be straight and true, with inner and outer surfaces concentric; they shall be cast vertically. The weight of each length shall be marked over the coating with white paint.

76. Coating.—The pipes shall be thoroughly cleaned and be free from all rust before being coated. The coating will be an approved coal tar dip coating heated to proper temperature. The finished coating shall be smooth and hard yet tough and durable, and must be free from blisters and pimples and be so elastic that by cutting into the coating and entirely removing some of it the opening can be covered by hammering edges around the side so that it is impossible to see the joint. If the coating on any pipes is abraded, or the pipes rusted in spots before laying or backfilling, such places will be thoroughly cleaned and painted with an approved mineral rubber paint.

77. Cast-iron pipe testing.—After water pipes are coated and before delivery they shall be tested to a hydrostatic pressure of 300 pounds per square inch. Pipes shall be rapped with hammer while under pressure, and any pipes which exhibit any defects by leaking, sweating, or otherwise will be rejected.

78. Steel.—All steel work shall be of standard shapes, medium steel, to conform to manufacturers' standard specifications. The contractor shall furnish to the officer in charge a certificate showing tests of steel used. Certificate shall show percentage of phosphorus, the tensile strength, elastic limit, elongation, and bending test, all of which must conform to specification. All steel work shall have one coat of paint applied in the shops, and to be dry before shipment, as hereinafter specified.

79. Rivet steel.—All rivets shall be made of rivet steel in accordance with the manufacturers' standard specifications and the contractor shall furnish a certificate of test of same as provided in paragraph 78.

80. Reinforcing steel.—Steel for reinforced concrete shall be square bars with an elastic limit of between 50,000 and 55,000 pounds, and an ultimate strength of from 85,000 to 100,000 pounds. The elongation in 8 inches shall be at least 1 per cent. Bars shall have an approved continuous mechanical bond.

Rerolled rails will not be acceptable for this work.

81. Cast iron.—All cast iron shall be of the best quality

tough gray iron, capable of standing chipping and cutting, free from cold shuts, blowholes, or other imperfections reducing its strength or durability, true to pattern and of a neat and workmanlike finish.

82. Paint for shop steel work.—The paint used for shop coat and for second coat on contact surfaces in shop and in field shall be composed of pure red lead mixture in pure raw linseed oil, without the addition of other substances, in the proportion of 25 pounds of lead to 1 gallon of oil. It shall be mixed in small quantities as required and be well stirred before applying. The second coat on inaccessible but visible portions applied in shop shall be the same as that used for second field coat. All structural steel shall have one shop and two field coats.

83. Paint for field coats.—The first and second field coats shall be an approved graphite paint, brown for first coat and black for second coat. It shall be applied as furnished in the original packages and without the addition of driers or other material. The paint used for contact surfaces assembled in the field will be a thick red-lead paint as specified for shop work. Cast-iron manhole frames, covers, and all other cast iron shall be given two field coats of an approved asphaltum paint.

84. Sand.—All sand must be clean, coarse, and sharp, of uniform quality, and must not show, when shaken with water and after subsidence, more than 5 per cent, by volume, of silt.

85. Gravel.—All gravel for concrete must be clean washed gravel of the best quality. The maximum dimensions for one piece shall be 2 inches and the minimum dimension shall be one-tenth inch. Gravel must be satisfactory in every respect to the officer in charge.

15 86. Broken stone.—All broken stone shall be trap, granite, hard limestone, or other suitable hard stone of a size that will pass through a 2-inch and be retained on a $\frac{1}{4}$ -inch screen.

Portland Cement.

87. Quality.—The cement shall be a true Portland cement of an established brand. It must be finely ground and free from lumps, caking or watermarks.

88. Kind—Slow setting cement will be required.

89. Packing.—Cement shall be packed in strong, well-

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coopered barrels, lined with moisture proof or heavy manila paper, or in strong cotton duck bags; each bag to contain one-fourth or one-third of the quantity specified for a barrel. A barrel shall have a gross weight of not less than 400 pounds and the net weight of the cement shall not be less than 375 pounds.

90. Storage.—Immediately upon delivery the cement shall be stored by the contractor in a dry, well-covered and ventilated place thoroughly protected from the weather, as directed by the officer in charge.

91. Chemical analysis.—For each lot of 500 barrels or more the contractor shall supply a certified chemical analysis from the mill of a mixed sample of the cement taken from any 10 barrels. If the cement is supplied in bags, a chemical analysis of an amount equivalent to that specified for the barrels shall be furnished. The cement shall not contain more than $1\frac{1}{2}$ per cent of sulphur trioxide (SO_3). The cement shall not contain more than 4 per cent of magnesia. The cement shall not contain an excess of free lime.

92. Physical qualities.—The cement shall have a specific gravity of not less than 3.05 nor more than 3.25. The color shall be a uniform bluish gray, free from yellow or brown particles.

93. Samples for test.—Samples of the cement shall be taken with a suitable instrument from the interior of the barrels or bags. Samples shall be taken from at least three barrels, and in lots of from 20 to 50 barrels from every fifth barrel, and in lots of more than 50 barrels from every tenth barrel, or in the same proportion by weight if the cement is supplied in bags. The separate samples for each lot shall be mixed together while dry, and the compound, without being sifted, shall be regarded as the sample for the test.

94. Fineness.—Ninety-two per cent by weight shall pass through a No. 100 sieve having 10,000 meshes per square inch, the wires to be No. 40 Stubs wire gauge, and 75 per cent by weight must pass through a No. 200 sieve having 40,000 meshes per square inch, the wire to be No. 45 Stubs wire gauge.

95. Mixing neat cement.—All neat cement for test shall be mixed rapidly on glass with clean water of a temperature between 60° and 70° F. and in an atmosphere of not less than 60° F. The quantity of water used may vary from 16 to 23

per cent of that of the cement by weight and shall be just sufficient to form a stiff paste.

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96. Setting qualities.—Five circular cakes of neat cement, mixed as specified in paragraph 95, 3 inches diameter, $\frac{1}{2}$ inch thick in the center and $\frac{1}{8}$ inch at the circumference, shall be molded on glass. They shall be made by rolling the cement into balls and flattening to the form specified, care being taken to thoroughly work the cement so as to prevent cracking at the edges on account of initial stresses. One cake shall be allowed to set in air and one immersed in water. Two wires, A and B, $\frac{1}{12}$ and $\frac{1}{24}$ inch in diameter at their lower ends and loaded with $\frac{1}{4}$ and 1 pound, respectively, shall be used to determine the setting qualities. Cement shall be considered satisfactory if needle A makes an indentation at the end of forty-five minutes and needle B does not make an indentation at the end of eight hours after being mixed.

97. Checking and cracking.—Three of the cakes prepared as specified in paragraph 95 shall be covered with wet cloths and allowed to set hard. One cake shall be immersed in cold water at the end of twenty-four hours and one kept in moist air above the freezing point. These cakes shall be examined from day to day for a period of twenty-eight days. If either cake warps, cracks at the edge, checks on the surface, or shows brown discoloration the cement will be rejected. The third cake shall be allowed to set for three days in moist air at a temperature not below 60° F. and then be immersed for six hours in boiling water. If it shows any of the defects specified above, or becomes soft or friable, the cement will be rejected. Fine hair-like cracks on the surface of the cakes specified in this paragraph shall not be cause for rejection.

98. Sand.—The sand used for making the mortar briquettes shall be No. 4 standard crushed quartz of such size as to pass through a No. 20 sieve (400 meshes to the square inch), wire to be No. 28 Stubs wire gauge, and be caught on a No. 30 sieve (900 meshes to the square inch), wire to be No. 31 Stubs wire gauge.

99. Making briquettes.—The briquettes shall be of the shape adopted by the American Society of Civil Engineers as a standard.

Neat briquettes.—The cement shall be wet with 16 to 23 per cent of water, by weight (the amount being just sufficient to make a stiff paste when thoroughly mixed), mixing and kneading rapidly by hand, using rubber gloves for protection.

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When thoroughly worked, the molds shall be filled at once, having first been wiped on the inside with an oily cloth. The cement shall entirely fill the molds and be moderately tamped and worked, so as to exclude all air bubbles, and be immediately smoothed off with a mason's trowel.

Mortar briquettes.—One part, by weight, of cement and three parts, by weight, of the sand specified in paragraph 98 shall be thoroughly mixed while dry and then wet with 8 to 12 per cent of water and mixed and molded as specified for neat briquettes.

While drying in air the briquettes shall be covered with damp cloths. After molding, the briquettes shall be kept in air for twenty-four hours and then in water at a temperature of not less than 60° F., and if possible not above 70° F.

100. Tensile strength.—The briquettes, prepared as specified in paragraph 99, must stand a tensile stress per square inch before breaking when the load is applied uniformly at the rate of 1,000 pounds per minute, as follows:

Neat briquettes:	Pounds.
After twenty-four hours in air.....	200
After one day in air and six days in water.....	450
After one day in air and twenty-seven days in water....	650

The seven-day test shall show an increase of at least 50 per cent in strength over the one-day test and the twenty-eight-day test an increase of at least 15 per cent in strength over the seven-day test.

Mortar briquettes:	Pounds.
After one day in air and six days in water.....	150
After one day in air and twenty-seven days in water....	250

The twenty-eight-day test shall show an increase of at least 20 per cent in strength over the seven-day test.

Five briquettes shall be broken for each test and the average of the three highest considered as the strength of the cement.

101. Concrete.—All concrete, unless otherwise specified, shall be composed, by measure, of 1 part Portland cement, 2½ parts sand, and 5 parts broken stone or gravel; roof slabs and reinforced concrete shall be composed of 1 part cement, 2 parts sand, and 4 parts broken stone or gravel; the maxi-

imum size of stone or gravel for reinforced concrete to be 1½ inches; the cement to be measured as packed and delivered. All concrete shall be made as follows: The cement and sand shall be thoroughly mixed dry on close platforms. This dry mortar shall then be spread uniformly over the platform, and upon it shall be spread an even layer of broken stone or gravel, which shall have been thoroughly wetted. The ingredients then shall be thoroughly mixed by being turned over at least three times, any necessary water being added, meantime, in the form of spray. The concrete shall be deposited in layers not greater than 10 inches thick and shall be rammed thoroughly and until water appears on the surface. The surface of each layer shall be thoroughly moistened before another layer is deposited upon it, and if it shall have been exposed for more than ten hours it shall be dusted with neat cement after it has been moistened. No concrete shall be deposited after it has commenced to set. When in place and rammed, all stepping or walking upon it shall be prevented for at least twelve hours. No concrete shall be mixed except in the presence of a Government inspector and in a manner approved by him, and none shall be mixed in frosty weather. An approved mechanical mixer may be used if preferred.

102. Facing concrete.—Concrete shall be deposited in a manner so thorough as to give a smooth, finished appearance to all surfaces, with no stone or unfilled spaces exposed. After forms are removed concrete shall not be plastered. The floor and gutter in tunnel, manholes, and valve boxes shall be plastered with 1 inch of 1 to 2 mortar placed as soon as concrete is finished. All water shall be removed from trenches and pits before concrete is deposited.

103. Forms.—All forms shall be tongued and grooved material, smooth and well braced to secure perfect alignment and to prevent bilging. Where the sides of trench stand up well enough, the concrete side walls may be placed without outside forms.

104. Mortar for pipe joints.—Mortar for pipe joints shall be composed of 1 part cement to 1 part sand.

105. Mixing mortar.—All mortar shall be mixed in closed, tight boxes and in small quantities, as required, and of approved consistency. It shall be immediately used, and any mortar which has acquired an initial set shall be thrown away. No rettempering of mortar will be permitted. No mortar or concrete shall be mixed or used in freezing weather.

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106. Excavation.—The contractor shall excavate all trenches for tunnels and mains along perfectly straight lines and of such dimensions as will leave ample room for necessary bracing and for handling forms, pipe and materials, and for performing all the necessary work of placing same. Whenever it is necessary to excavate a portion of trench to a greater depth than main body of trench (in order to accommodate one or more pipes at different levels in same trench) the walls of trench shall be securely braced whenever there is any liability of trench caving. Whenever a trench has been dug too deep, or wherever trench floor that is shelved to accommodate mains at different levels, as described above, caves, thus destroying firm bearing of the higher mains, the floor shall be filled to proper level with sand or gravel to the satisfaction of the officer in charge. In no case will it be permitted to deposit concrete floor of tunnel, or lay mains on a refilling of clay and loam. Elevations are shown at 100-foot squares, giving original height of ground. In some cases excavated material has been placed around buildings which raises the grade. The contract price shall cover excavation for trenches through such material where it does not exceed the final grades of ground. Where excavated material is in piles above the finished grade the excess material will be removed down to final grade by others.

107. Bracing.—Trench shall be securely braced, using planking and trench braces wherever same is necessary. Trenching and placing of materials shall be done in such a manner as will permit of least injury to trees, shrubbery, and other objects. Care shall be taken that no building foundation bearings are weakened.

108. Pumping.—Trenches and pits will be kept free from water during the progress of the work, and the contractor will provide necessary pumps and labor to keep same clear. No water shall be allowed to pass through pipes or tunnel during construction.

109. Laying drain pipe.—Drains from gutter in tunnel, and from manholes and valve boxes, etc., are shown or indicated on plans. These shall be carried and connected to drain mains now being placed under another contract. The contractor will be required to set up firmly secured frames with sight rail in advance of the pipe at distances not over 30 feet apart. The center line of the drain shall be plainly marked on these sight rails and a gauge line drawn tightly over these

points. He shall provide a T rod and have the depth of grade below the gauge line plainly marked on this rod, and he shall test the elevation of each pipe joint as laid.

16 The rod shall be plumbed as each joint is tested. All pipes shall be laid upgrade, with the bell end of the pipe at the highest elevation. Each pipe joint shall fit easily and without trimming, and the spigot of each pipe shall rest firmly against the shoulder of the next lower bell. Spigots shall be set in cement mortar in invert of bells. Cement mortar shall be firmly pressed all around into the joint by hand or by wooden tool and the joint finished with a pointing trowel to a neat bevel to the full thickness of the bell. The mortar on under side of the external bevel shall be held in approved manner.

110. All manholes, valve boxes, pits, etc. shall be drained under this contract. Also in case drains in addition to those shown are needed for tunnel in order to secure complete removal of water, they must be included. This contractor shall make all connections from tunnel, manholes, etc., to the main drains now being placed under another contract, and he shall be responsible for the complete drainage of all his work. A copy of the plan showing main drains may be obtained at the Naval Station. The principal drains, however, are shown on the distributing main plans, that points of connection may be noted.

111. Underdrains.—All wooden casing shall be underdrained except for 2½-inch pipe sizes and smaller. Where a number of pipes lie in the same trench one drain shall be sufficient for all, but it shall be set low enough to drain all lines. Two inches of coarse gravel shall be laid under casings and gravel will lead to and around underdrain. Where short connections (less than 80 feet) are laid from tunnel to buildings which have a good slope (1 per cent or more) it will not be necessary to use farm tile, but there shall be 3 inches of gravel under casings and this gravel layer shall be carried down alongside of tunnel or pit, with pipe opening at floor to discharge to gutter or drain. These farm tile will be 3-inch in drain for runs not over 200 feet, and 4-inch diameter for longer runs. Drains shall be placed first to keep concrete tunnel free from water. Small pipes may be placed at intervals along base of side walls at floor to prevent retained water from overturning these walls during construction.

Concrete Tunnel and Manholes.

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112. There shall be constructed a concrete tunnel as shown on plans and described herein. Trench shall be excavated to proper breadth and depth, and a floor of concrete 8 inches thick shall be placed. Floor shall be finished with cement mortar, as hereinbefore specified. Floor shall be given slope to gutter as shown on detail sheet. To control cracks in floor and walls there will be a vertical joint every 50 feet. This will be formed by stopping concrete against a plank and starting new section against this vertical section of concrete when same is set and plank removed. Thickness of floor shall be maintained under gutter, as indicated on detail plans, the amount of offset to be determined by slope of gutter. In laying floor, the sides of slab where walls will rest, shall be made 1 inch lower in order to provide shoulder for side wall as indicated on plans. Tunnel shall be constructed wider than is shown wherever it is necessary to secure passageway or working space by pipe connections or apparatus.

113. Walls.—Walls shall be built accurately to line and thickness shown. Where nature of ground permits, walls may be placed without outside forms. Visible surfaces shall be left smooth as hereinbefore provided. Transverse I beams shall be firmly and accurately held in place by forms as concrete is deposited. Manholes shall be brought to finished grade, surfaces faced and iron frame built in, in manner satisfactory to the officer in charge. For a distance of 30' west of R. R. trestle, the north wall of tunnel shall be 15" thick, and 12" thick for an additional distance of 20'.

114. Removal of forms.—Forms for walls and roof shall be left in place at least seven days after concrete has been placed, and for longer period if so directed by the officer in charge.

115. Backfilling.—No backfilling shall be done until roof slab is placed. For a distance of 50' west of R. R. trestle abutment, backfill shall be tamped to carry railway. With the exception of the above specified 50', backfill need not be tamped except around manholes and across drive and walk ways, but shall be flooded if directed by the officer in charge. Surplus material shall be disposed of as directed by the officer in charge; being used for grading around nearest building where practicable.

116. Roof slabs.—Pipes shall be placed and tested before roof slabs are constructed. Roof slabs of 1-2-4 concrete shall

be continuous and reinforced both across slab and longitudinally. See section of 6' x 6' tunnel for reinforcement of 6-foot span. Slabs shall be designed for a total load of 750 pounds per square foot. For a distance of 50' west of R. R. trestle abutment, roof slab shall be 9" thick and designed for a total load of 1,150 pounds per square foot. Cross reinforcement to have depth of concrete under bar equal to width of bar. Longitudinal reinforcement to be above this. Longitudinal bars lapped 18 inches. Use extreme fiber strain 500 pounds per square inch for concrete and unit stress of 12,000 pounds per square inch in cross bars.

117. Though roof slabs are shown on section as 7 inches and 6 inches thick, they may be built as 7 inches and 6 inches thick at center, and 6½ inches and 5½ inches thick at walls. At points designated certain roof slabs shall be left free to permit their easy removal when taking out pipes.

118. Waterproofing.—After roof slab is dry it shall be painted with two heavy coats of waterproofing paint made of coal tar, cement, and kerosene, mixed and applied as directed by officer in charge; or shall be waterproofed by two layers of 15-pounds felt placed and tarred in approved manner. Sides and floor will not be waterproofed.

119. Manholes.—Manholes shall be provided where shown with cast cover, frame, and ladder, as shown on sections. Pits shall be constructed in side of tunnel for transformers, the length of same to suit sizes of apparatus with ample clearance spaces for working. Manholes outside of tunnel shall have walls and roof slabs constructed as specified for tunnel. Ladders in manholes to be of galvanized ¾-inch round iron or steel, built into concrete as shown. Depth of slabs at manholes in tunnel and reinforcement shall be increased to give a strength capable of carrying 750 pounds per square foot.

120. Manhole covers.—Manhole covers shall be set at finished grade. The manhole covers over tunnel shall be special ventilating manholes, so designed that same may be raised to height desired for ventilating, and bronze screw shall have such clearance that there will be no possibility of same being strained or bent by shocks to manhole cover when same is raised. The manhole sections show a scheme for such manhole. Detail drawings showing all sizes and clearances shall be submitted for approval. Other designs may be presented for consideration. Sample manhole shall be delivered for test before others are made up. All manhole covers, both in tunnel and in mains outside of tunnel, shall have a raised

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letter cast in the center to indicate character of manhole. Tunnel covers shall have the letter T; electrical manholes shall have the letter E; heating main manholes outside of tunnel shall have the letter H; etc.

121. Manholes outside of tunnel that contain expansion joints or traps shall have an approved standard double cover, the lower cover to be water-tight, the upper cover to have letter as specified. Drawings showing details and dimensions of all manholes, covers, etc., shall be submitted for approval. Construct or enlarge manholes for traps as required.

122. Valve boxes.—Where shown or required there shall be valve boxes of concrete as shown on detail sheet of plans; these boxes to be drained to nearest main drain or other approved outlet. If contractor desires, valve boxes may be enlarged to include other pipes in same trench. This will enable mains to be placed near together. Where two or more valved branches are taken from mains at same point one box may contain all valves. Detail drawings of valve boxes shall be submitted for approval. Construct concrete handle-holes for junction boxes where required.

123. Where there are automatic drip or service valves on mains or branches outside of buildings, tunnel, or manholes these valves shall be inclosed in concrete valve box with cast-iron cover, and a heavy adjustable stem casing and deep cover of an approved service-box type, set at grade level. The cover of the stem casing of these boxes shall be of cast iron, and shall have raised letters to indicate the nature of the valves covered. Plans shall be submitted for approval.

124. Regulating valves on hot-water mains.—Valves used for adjusting flow, and which should not be disturbed after being set at proper opening, shall have a cast-iron box and adjustable stem casing placed with cover about 6 inches below surface.

Hangers and Supports In Tunnel.

125. Anchors.—Detail plans of tunnel and manholes indicate methods of supporting and anchoring pipes. Channels for anchors and expansion joints shall be placed where indicated on plans before roof is placed. Channels and angle-iron brackets shall be painted as specified hereinbefore for steel work. Cast-iron anchorage seats shall be painted with graphite paint as specified for field coats on steel

work, instead of asphaltum paint as specified for cast-iron work. The method of anchoring pipes and expansion joints to channels may be changed, at the direction of the officer in charge, to an equal approved standard anchor base fitting.

126. Hangers.—Detail plans of typical hangers are shown. Stirrups for hangers may be slipped upon roof beams, before they are built into concrete walls. Stirrups must be painted both field coats before placing.

127. In order to secure perfect alignment of pipes, plans must be submitted by the contractor showing longitudinal section throughout tunnel and giving the elevation of all pipes. From this, drawings for hangers shall be made giving the exact spacing of all holes, which holes shall not be punched but shall be accurately drilled to proper spacing. Plans for alternate hangers may be submitted for approval in case the design shown can be improved upon, and in case such alternate hangers are superior they may be used.

128. Conduit racks and boxes.—Electrical mains shall be supported in approved cast-iron racks with spaces for future mains. The pull and junction boxes shall be supported in an approved manner and shall have provision for future mains. The exact location of electrical mains in tunnel shall be such as to prevent interference with manhole openings. The location of electrical mains as shown on detail plans is not intended to be an exact location, but is intended to indicate, in a general way, the position, and method of securing same. The officer in charge may permit different location than that shown, where such change of location benefits the construction.

Supports Outside Of Tunnel.

129. Pipes in conduit.—Pipes in wooden casing shall be supported on roller or ball bearings as hereinafter specified.

130. Anchors.—Pipes shall be anchored with an approved anchorage fitting solidly bolted to a cast-iron base set in a concrete block of an approved size and depth. Where anchors occur in run of mains outside of manholes, anchorage fittings shall be covered with an approved covering, making water-tight joint with pipe covering. Expansion joints shall be anchored to manhole floor in similar manner to that specified above for pipe anchors. At bridges the anchorages shall be made to framework of bridge, or by setting anchor bolts into concrete, or in other approved manner.

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131. Mains beneath trestle.—Mains shall be supported beneath railroad trestle to power house in a box conduit provided by others. Mains shall be hung from wooden cross-ties, or from steel framing, or shall be supported on roller or ball bearings in an approved manner.

132. Temporary wooden trestle.—The bridge between main plateau and receiving plateau, marked "Proposed Bridge" on plans, will not be constructed until some time in 1909. This contractor shall construct an approved wooden trestle to carry mains across ravine at the side of this bridge site. He shall guarantee and maintain this trestle for a period of one year from date of acceptance of contract, and shall repair all damage to same from all causes except that due to action of other contractors erecting adjacent work. Drawings for this trestle shall be submitted for approval.

Contours on 5 feet intervals of elevation are shown on 17 plan so that trestle may be designed. Bents shall be not over 30 feet apart. Bent posts will be 8-inch x 8-inch, and if spliced shall have bearing and bolted splice to full strength of section. Posts shall have good batter. Sway bracing will be in not over 12 feet vertical panels with 3-inch x 8-inch struts and 2-inch x 8-inch "X" bracing. Bearing sills for deep bents will be 10-inch x 12-inch x 16 feet long and for shorter bents in proportion. There will be two 10-inch x 12-inch strings, in one length, per bent, and there will be 3-inch x 10-inch knee braces at angle of about 45 degrees, 10 feet out from all bents to strings. All material may be rough and of best sound merchantable stock, or first-class, sound, second-hand bridge timbers. Strings to be of yellow pine. On top of trestle there will be a box about 4 feet square with floor, sides and roof made up of 1-inch tongued and grooved pine sheathing with 2-inch x 4-inch joists, studs, and rafters and roof covered with ready roofing arranged to drain over one side. In this box will be carried pipes covered as per specification for tunnel. Sills must be bedded to firm bearing on original soil throughout entire lengths. On completion of future concrete bridge, pipes will be moved and carried on same by others. This temporary trestle should be about 30 feet northwest of site of final bridge, and pipes should be so laid as to make least possible change when new and final work is installed. Sewer main shall also be carried on this trestle but shall be placed by others.

133. Bridge crossings.—The main bridge shown on plan is in place and has hole left in abutments and wooden casing

built to carry mains. The cold-water mains are now placed and the sewer mains are now under contract. This contractor will provide and set anchors and expansion joints at abutments and proper bearing blocks and rolls to take pipe in this casing. The pipe covering in bridge casing will be as specified for tunnel work. Plans of this bridge may be seen at the station, and the bridge may be inspected at the site.

134. Railroad trestle to power house.—This bridge will be built this summer, and will include a box conduit, 6 feet by 6 feet, for mains. This contractor shall carry all pipes and wires through box conduit and make connection outside of power-house wall.

Hot-Water System.

135. Connections at power house.—This contractor shall connect with 14-inch supply and return pipes, through taper-reducing fittings, outside power-house wall.

136. Branches to officers' quarters.—The contract for the six north officers' quarters and the commandant's house has not been let. This contractor shall leave mains blanked at outside of building walls. Contractor shall make connection to building mains inside basement walls in four south officers' quarters. These four buildings are practically completed.

137. Connection to building mains.—Building contractors will leave hot-water mains capped at point just outside of walls of all buildings, except the receiving group and the mess hall, and this contractor shall make connection to building mains at these points if building mains are ready. This contractor shall make connections to Mess Hall mains as indicated on sheet C-11, and to receive buildings mains inside of walls at points shown approximately on sheet C-7.

138. Expansion tank.—This contractor shall install an open expansion tank on the fifth floor of the Administration building. This tank shall be connected with hot-water return at point DE-7-8 east, shown on plans, by a 2½-inch pipe. This 2½-inch expansion pipe from DE-7-8 east to Administration building wall is in this contract and shall be covered as specified for mains. The building contractor shall furnish and install this 2½-inch expansion pipe from building wall to fifth floor of building. This contractor, however, shall make all connections to tank and furnish same. The ex-

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pansion tank shall have a capacity of at least 600 cubic feet, and shall be rectangular, 10 feet by 11 feet by $5\frac{1}{2}$ feet, or other approved size. Tank shall be of $\frac{1}{4}$ -inch steel plate, with $\frac{1}{2}$ -inch rivets, on 3-inch centers, and shall be stiffened at top and sides with $2\frac{1}{2} \times 2\frac{1}{2} \times \frac{1}{4}$ inch angles, spaced as approved. Tank shall be painted as specified for steel work. Tank shall contain an approved 3-inch high and low water float valve, which will automatically open when water level in tank is 18 inches, and will close when water level reaches 42 inches. This valve shall operate against a varying pressure of from 0 to 20 pounds without adjustment. Supply pipe to tank shall be 3-inch, and shall have a gate valve, as specified for hot-water mains. Tank shall have a 5-inch overflow pipe.

139. Work with building contractor.—Building contractor will install a 10-inch water supply and a 6-inch overflow main to water-supply tank in Administration building tower above expansion tank. This contractor shall furnish a $10 \times 10 \times 3$ inch and a $6 \times 6 \times 5$ inch T, which will be placed in supply and overflow pipes of water-supply tank by the building contractor. This contractor shall arrange with building contractor for placing these fittings and to pay extra cost, if any, of placing same. This contractor shall supply and install 3-inch pipe supply and pipe overflow connections between tank and these building mains. The overflow connection shall have a check valve to prevent overflow from large building tank backing into expansion tank.

140. Piping.—All mains and branches shall be strictly wrought iron, manufacturers' standard weight, with standard threads. All mains in tunnel 6 inches and larger shall have standard weight screwed flanges and flanged fittings of first-class cast iron, with best red rubber gaskets, $1/16$ inch thick, gaskets to be at least 30 per cent pure Para gum mixed with dry mineral matter only. All mains and branches smaller than 6 inches shall have standard weight cast-iron screwed fittings and screwed couplings. All mains and branches outside of tunnel, including the 8-inch and smaller mains feeding the receiving buildings, shall have cast iron screwed fittings and screwed couplings. All lines of screwed pipe shall have a flange joint every 200 feet, exclusive of valve and expansion joint flanges.

141. Protecting screwed ends.—All pipe 4 inch and above must be shipped with couplings, or half couplings screwed on to protect threads. Broken threads will be cause for rejection. Before joints are made up, all threads must be

cleaned of grit and dirt and painted with a coat of red lead or with approved brand of steam fitters' cement applied from the original package.

142. All fittings shall be sweep fittings and shall be long radius fittings wherever possible. Approved angle fittings or wedge fittings shall be used where changes in grade or alignment occur.

143. Location of valves.—Where possible all automatic drip valves, adjusting valves, stop valves, etc., shall be set in tunnel.

144. Valves.—All valves, except where otherwise specified, shall be approved straightway gate type, and wherever possible valves 4 inches and larger shall have outside screw and yoke. All valves 4 inches and larger shall be flanged with double bronze gates and seats and bronze spindles. Sizes larger than 2 inch and smaller than 4-inch shall be screwed with iron body, bronze gates, seats and spindles. Valves 2 inch and smaller shall be all brass or bronze. All valves, except as specified below, shall have standard wheels.

145. All valves buried in ground, and all valves which are designed to adjust and equalize flow of water through mains, and which should not be disturbed after being set, shall have pentagonal nuts on stems of same size as used for valves for cold-water-supply system. Other valves to have standard hand wheels.

146. All valves, including automatic drip valves, shall open to the left.

147. Automatic drip valves.—Automatic drip valves shall be of approved type, flanged, iron body, bronze mounted, with bronze spindles, straightway, wedge-gate valves, with drip piped for iron pipe connection. These valves shall be so placed that they will drain all piping in buildings or runs exposed to danger of freezing when closed. Iron pipe drain shall be carried from drip to nearest floor gutter or drain.

148. Air valves.—At four high points on supply and return lines, place 1-inch pipe, with 1-inch globe valve, for removing air from main as same is filled. Where pipes rise at mess hall and receiving building and on 8-inch mains at end of trestle, and at three other points where air can collect, place a 3-inch pipe riser from top of main, with an automatic air valve of approved size to remove air during operation of system.

149. Relief valves.—There shall be furnished approved 3-inch water relief valves at the points shown on plans.

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These valves to be iron body, bronze or nickel disks and seats, and to permit of adjustment while under pressure.

150. Scale pockets and blowouts.—Where it is possible for scale or dirt to collect, and where mains rise, and where advisable to protect important valves (automatic drip, and large gate valves) from collection of scale and dirt, place a 3-inch pipe scale pocket below main, with 2-inch blowout valve of an approved type. Blowout to be piped to near floor gutter or drain. At temporary trestle place 8-inch scale pocket on mains with 4-inch blowout valve, as indicated on plans. Carry 4-inch blowout pipe buried to bed of ravine. At main bridge, carry blowout drain pipes buried to bed of ravine.

151. Expansion joints.—Expansion joints shall be flanged brass slip expansion joints, and at points located on plans double slip joints shall be used unless otherwise noted or directed, where single joint shall be used. Joints shall be packed with highest quality asbestos or metallic packing. Expansion joints shall be anchored as hereinbefore specified. Expansion joints shall be guaranteed not to leak. Ends of pipe entering expansion joints shall be supported by same fitting to secure perfect alignment.

152. Where service or lateral connections are made at points in the line where expansion joints, either of the single or double type are used, the lateral connections shall be taken from the central portion of the expansion joint.

153. Anchors.—Pipe shall be anchored as shown on detail sheets, or in manner approved by the officer in charge.

154. Expansion of branches.—All branches shall be so connected to main as to take care of all expansion. Branches from Administration Building, west dormitories, drill hall and from officers houses and similar points shall have a 10-foot arm parallel to main with turn fittings to relieve main of strains from expansion of branches. Expansion of branches in receiving dormitories shall be taken care of by arms in buildings.

Pipe Covering.

155. Hot water mains in tunnel.—Hot water mains and branches in tunnel shall be covered with a one inch thick sectional covering composed of layers of wood felt with 1/16-inch thickness of asbestos next the pipe and 1/4-inch thickness of waterproofed felt outside, finished with jacket of 7 oz. canvas well lapped and cemented and painted 2 coats of ap-

proved waterproof paint. Brass bands of No. 28 gauge stock, 1 inch wide shall be placed every 18 inches. Flanges to be covered and bound with the same material, or with covering specified for valves and fittings. All covering shall be equal to sample to be seen at the Naval Station.

156. Valves and fittings.—Valves and fittings shall be covered, with 1 inch thick 45 per cent magnesia or equal moulded covering, with two layers of waterproof felt and canvas jacket painted with two coats of waterproof paint.

157. Hot water mains outside of tunnel.—Hot-water mains and branches outside of tunnel shall be laid in a wooden pipe covering similar and equal to 2-inch Wyckoff covering, to consist of an inner course of 8 selected clear white pine boards, $\frac{3}{4}$ or 1 inch thick, well wrapped with galvanized wire, then covered with two layers of heavy corrugated paper, then an outside casing of wood similar to inner casing, then coated with asphaltum pitch. Covering to be made in lengths of from 4 to 10 feet, and shall be joined with tenon and socket joints. Pipe shall be centered and supported in covering by cast-iron rolls and guides. In bends and branch runs, where expansion would cause a lateral movement of pipe, the covering shall be of sufficient size to permit expansion of pipe without undue strains on pipe or covering. Where covering connects with tunnel and building walls, it shall be carried into openings left in concrete, and after pipes are lined up, contractor shall make waterproof joint by filling in with cement mortar.

158. Mains and branches in valve boxes, manholes, basements, and below bridges shall be covered as specified for mains in tunnel.

159. Gauge connections.—Wherever returns from buildings connect to mains, and wherever flow-adjusting valves are placed, install a nipple and cock for attachment to pressure gauge.

160. Gauges.—Provide one dozen approved pressure gauges reading to 200 pounds pressure. These will have 3-inch dial, iron case, brass ring, and shall be of best commercial manufacture. They shall be of the Bourdon tube type, all pinions and segments to be cut by milling machine or shaper and all burrs removed. Stamped pinions and segments will not be approved. See paragraphs 179 and 189 for other gauges.

161. Thermometers.—Install a 10-inch hot-water thermometer, brass case, at all points where branches from build-

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ings connect to hot-water mains. These shall be connected in approved manner at convenient points where readings may be readily taken. Install six other thermometers at points to be designated by the officer in charge. At places outside of tunnel where there is no manhole, where branches connect to main, the above hot-water thermometers may be omitted.

Steam Supply System.

162. Service.—The service supplied by steam mains is shown on plans which also shows runs and sizes of piping. This contractor shall investigate the amount of steam required, and shall be responsible for the delivery of same, but in no case will smaller pipes be permitted than those shown. All provisions and specifications for hot-water-circulating piping, to apply here wherever practicable, except as follows:

163. Connection at power house.—This contractor shall connect with 10-inch steam supply pipe through eccentric reducing fitting, at point outside power-house walls.

164. Branches to officers' quarters.—Paragraph 136 shall apply to steam mains, with the exception that the steam branches to six north officers' quarters shall be left blanked near steam main. Connections to four south officers' quarters shall be made as specified for hot-water mains.

165. Piping.—Piping will be strictly full weight, wrought-iron pipe, with extra heavy cast-iron flanges with annealed, corrugated, copper gaskets, wherever standard flanges and red rubber gaskets are specified for hot water. Sizes below 6-inch to have extra heavy screwed couplings and fittings.

166. Fittings.—All fittings where bends or reductions are made, except as specified hereinafter for anchors and expansion joints, shall be eccentric to prevent water pockets. All reductions in mains shall be made with eccentric fittings or eccentric flanges. All fittings shall be extra heavy cast-iron flanged fittings for 6-inch and larger, and extra heavy cast-iron screwed fittings for sizes smaller than 6-inch. Expansion joints shall be extra heavy.

167. Valves.—All valves in mains and branches and in drips where subjected to pressure of main shall be extra heavy gate valves, with best steam metal gates and seats, flanged, outside screw and yoke, for 4-inch and larger, and screwed for smaller sizes. Valves smaller than 2-inch shall be all brass or bronze and shall be either straightway gate

or globe type. If globe valves are used, they shall be so placed as to prevent water pocket when valve is closed.

168. Plans for handling condensation in mains.—The contractor shall submit for approval plans showing how condensation from mains and branches will be returned through vacuum return. These plans shall show all piping and sizes, valves, traps, receivers, reducing valves, vacuum valves, by-pass connections, etc., required to handle the condensation. Wherever possible condensation from high-pressure piping shall be discharged through traps to receivers connected by vapor pipe to low-pressure building mains before it is returned to vacuum return mains. Where such low-pressure condensation branches are used, they shall have vacuum valves corresponding to the type of vacuum return valves used in buildings. All traps, reducing valves, and similar apparatus shall be by-passed and valved to permit same to be cut out of service for overhauling and repair, without stopping flow of condensation.

169. In general, the service branches will be taken from top of mains from the center body of anchor-fitting, expansion-joint or service fitting, and condensation will be taken in drip piping of ample size from bottom of fitting and trapped to low-pressure building mains, or, if condensation is so great that all water will not be converted into steam when discharged into low-pressure building mains, drips shall discharge into receiver and through traps to low-pressure piping connected to buildings, and excess water from the low pressure piping shall be drained from receiver to vacuum return through an approved vacuum valve. All such drip and vapor branches required shall be in excess of the regular service branches and no drip branch shall have piping smaller than $\frac{3}{4}$ -inch, and no vapor branch shall be less than $1\frac{1}{2}$ -inch. All to be submitted for approval.

170. Drips.—At frequent intervals along the line and at all low places and pockets where water may collect, drips shall be placed which shall carry condensation as described above. Apparatus for draining system shall be such that no water will be discharged into building mains, and that there will be no possibility of flooding vacuum return or destroying the vacuum by discharge of condensation.

171. If approved by the officer in charge, a method of taking service branches from bottom of mains and separating condensation from steam by means of a separator and trap,

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or receiver and trap, and then discharging condensation into low-pressure mains in building may be used.

172. Traps.—Traps shall be of approved construction, heavy, and of ample capacity. The bucket or tilting types are preferred. If a hollow-float type is used, float shall be seamless extra heavy copper sphere, or of brazed type with copper ring reinforcement brazed on over seam. Traps shall be such as to permit of inspection and repair of mechanism. Traps which are subjected to pressure of steam main shall be guaranteed to 200 pounds.

173. Receivers.—Receivers shall be of ample capacity, of approved type and construction. If of steel plate, they shall have all openings properly reinforced by welded ring, or by riveted plate. Plans showing size and spacing of rivets, and thickness of flats shall be submitted for approval. An approved air cock, gauge glass, with valves, and a pipe connection and cock for pressure gauge shall be provided on all receivers. Receiver shall have blowout opening and a blowout valve of approved type and size. Blowout opening shall be located at bottom of receiver and discharge shall be piped to near floor gutter or drain. All receivers subjected to pressure of steam main shall be extra heavy, guaranteed for 200 pounds pressure. All other receivers shall be standard for 125 pounds pressure. Receivers shall be painted two coats as per other apparatus.

174. Blowout.—Blowouts and scale pockets for scale and dirt shall be placed as specified for hot water, but shall be extra heavy, and of approved size.

Pipe Covering.

175. Steam mains in tunnel.—Steam mains and branches in tunnel shall be covered with a sectional covering, made up of alternate layers of asbestos and wool felt to standard thickness and with $\frac{1}{4}$ inch of waterproofed felt over this, and to be finished with canvas jacket, banded and painted substantially, as specified for hot-water mains. Valves, flange fittings, and other equipment shall be covered with moulded covering of equal insulating quality, 1 inch thick, finished as above. Drips where required shall be covered same as main. Vapor branches connecting drip receivers to building main shall be covered. Branches from vacuum valves to vacuum return will not be covered.

176. Steam mains outside of tunnel.—Steam mains and

branches outside of tunnel shall be laid in a wooden pipe covering, similar to that specified for hot-water mains, but shall be lined with tin and asbestos and shall be equal to Wyckoff lined casing.

177. Mains and branches in valve boxes, manholes, basements, and below bridges to be covered as specified for mains in tunnel.

178. Connections of covering to tunnel and building walls to be as specified for hot-water mains.

179. Gauge connections.—Install ten nipple and cock connections for pressure gauges on steam main at points to be designated by the officer in charge.

Vacuum Return Mains.

180. Service.—The vacuum return mains shall be of ample size to maintain a vacuum throughout system. The sizes shown on plans shall not be decreased, but shall be increased or revised in case the contractor can not otherwise guarantee the successful operation of the system. The plans show the apparatus under building contract to which system is attached. All of this apparatus will be provided with automatic vacuum valves, and valves used in this contract shall be similar or equal to those installed. Plans of vacuum mains and pumps at the power house may be seen at the station. Connections shall be made to 7-inch pipe at power house and to building piping as for water and steam mains. All provisions of this specification for water and steam mains apply to vacuum return mains, except as hereinafter noted or modified.

181. Piping.—Pipe will be of manufacturers' standard weight strictly wrought-iron pipe with standard cast-iron screw fittings throughout, except for flanges at frequent intervals and at valves, etc., as specified for hot-water mains.

182. Valves, etc.—Valves and fittings shall be as specified for hot water.

183. Vacuum valves.—Vacuum valves placed by this contractor on drips returned to vacuum mains, and wherever required, shall be of an approved type, similar to valves in building contract, with bronze seats and disc, and shall be guaranteed to remove all condensation and prevent flooding of vacuum return, and shall operate throughout ranges of pressure and vacuum carried. Cuts and specifications of valves shall be submitted for approval.

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184. Blowouts.—Blowouts shall be as specified for steam mains, but are to be standard weight, instead of extra heavy.

185. Pipe covering in tunnel.—Vacuum return mains in tunnel will not have an insulating covering, but will be given two coats of an approved paint.

186. Pipe covering outside of tunnel.—Vacuum return mains and branches outside of tunnel to be covered, as specified for hot-water mains outside of tunnel, with the exception that in manholes, valve-boxes, basements, and below bridges they will not be covered, but will be painted as specified for vacuum returns in tunnel.

187. Grades.—Elevations to invert of pipe are shown on plan, and these elevations will be maintained. Wherever vacuum return rises special approved water seal fittings with 45 degree turn at top and bottom of rise shall be used. At four main dormitories vacuum return will leave buildings below other pipes, and at an elevation of 59½ feet. Return from swimming tank in instruction building will be below other pipes, and at an elevation of 63½ feet.

188. Gauge connections.—Install ten nipple and cock connections for gauges on vacuum return mains at points designated by the officer in charge.

189. Gauges.—Provide six steam gauges similar to those specified before, but these shall be combination pressure and vacuum gauges and to be calibrated from 30 pounds pressure or above, to 30 inches vacuum.

Miscellaneous.

190. Wrenches.—Contractor shall furnish two sets of all wrenches required for operation and repair. Each set shall include three socket wrenches of different lengths for valves in ground.

191. Packing.—Contractor shall furnish enough extra packing of quality hereinbefore specified for expansion joints, to repack all joints.

19

Pipe Tests.

192. Tests during erection.—All pipes will be capped at frequent intervals and tested in sections that pipe covering, tunnel covers, and backfilling may proceed. No pipe shall be covered till tested and accepted. Tests will be hydrostatic and gauge must hold 200 pounds pressure on steam mains and

150 pounds pressure on water mains without visible leak. Vacuum return mains shall be absolutely tight under 50 pounds pressure.

193. Tests after erection.—After all piping is complete, it shall be filled with water and shall be tested as follows:

Steam mains and branches shall be tight under hydrostatic pressure of 200 pounds. Hot-water mains shall be tight under 150 pounds pressure. Vacuum mains and branches shall be tight under 50 pounds pressure. All leaky joints shall be taken out and remade where so directed. Slight sweating in vacuum return joints may be made good by the use of "Smoothon" or similar approved material. All labor, materials, and instruments for tests shall be furnished by contractor, who shall conduct test under the supervision of the officer in charge.

Electric Distribution System.

194. General description.—Plans show runs and sizes of all electrical mains. Sections of tunnel show typical arrangement of supporting cables, and other sections show typical construction outside of tunnel. Connections will be made to mains outside of power house and inside of other buildings, at points shown on plans. This contractor to carry wires through basement of officers' quarters as shown, and will provide junction and make connection to service switches in these buildings. Attention is called to the fact that at places the plans show a greater number of ducts than are required for the conductors under this contract. These are provided for future extension, and this contractor will install ducts as shown on plans, and will close openings of empty ducts in an approved manner. In installing iron conduit in tunnel, the location of conduit and boxes shall be such that future conduit may be installed without interference. Cables shall enter and leave duct in tunnel and manholes in such a manner that future conductors may be run without interference.

195. Tunnel-lighting circuits.—This contractor shall install all conduit wires, fixtures, switches, and lamps for lighting tunnel. Tunnel will be lighted in five sections of ten lamps each, placed where directed by the officer in charge. Each section controlled by three-way switches located on side wall of manhole, at ends of section. The first section to extend from power house to manhole in square "D" "E"—"7" "8" east. Switches placed at entrance to tunnel, beneath R. R.

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bridge, and at manhole. Current to be taken from transformers at "D," "E"—"7" "8" east. Second section, from manhole D-E—7-8 east to end of tunnel at K-L—7-8 east, fed from administration building transformers controlled by three-way switches at manholes D-E—7-8 east and K-L—7-8 east. Third section: From manhole D-E—7-8 east to manhole at west end of instruction building, controlled from each end, fed from instruction building transformers. Fourth section: From manhole west end of instruction building to mess hall, controlled from manhole at each end, fed by mess hall transformers. Fifth section: Mess hall to end of tunnel, controlled from manholes in squares F-G—10-11 west, and I-J—10-11 west, fed by south dormitory transformers.

196. Bridge-lighting circuits.—This contractor shall furnish and install the wires shown for lighting bridges, and in the case of the main bridge he shall make connections to the iron conduits running from bridge newels to center of roadway (which iron conduits and pull wires are now in place), and he shall arrange for the pulling of wires to these newels. He shall furnish, install and connect a service box in basement of the northwest dormitory. Service box to be an approved box similar to boxes placed by building contractor, and shall contain a three-pole 25-ampere knife switch with inclosed fuses. This contractor shall also furnish, install, and connect on first floor of receiving building a service box as specified above. These boxes will control lamps on bridges. Lamps, and wiring from junction boxes on bridges to lamps, are in separate contract.

197. Tunnel-lighting circuits.—Tunnel-lighting circuits are to be cambric-covered, double-braided wire, carried on porcelain cleats or knobs. Sockets, switches, etc., to be waterproof type.

198. Iron conduits.—All electric conductors in tunnel, exclusive of tunnel-lighting circuits, shall be run in enameled iron-pipe conduit of standard gas-pipe thickness, with pull and junction boxes of approved type, in accordance with underwriters' rules for subway work. There will be one pipe of approved size to each circuit, and supporting racks and boxes shall be provided for future pipe and circuits as shown on detail sheets of plans. Conduit and boxes shall be watertight.

199. Boxes.—All junction and pull boxes, fuse and cut-out boxes, and portions of installation containing bare conductors

shall be of an approved water-tight construction, so that in case tunnel is flooded, service will not be interrupted.

200. Fuses.—Fuses will be of approved inclosed type, mounted in a subway box of an approved type.

201. Vitrified ducts.—Primary circuits outside of tunnel will be run in approved vitrified ducts with concrete casing on sides and top. Where old trenches or filled ground is encountered, ducts shall have a concrete base of sufficient size and bearing to safely carry conduits over section where possible settlement might occur. The plans show the number of ducts required at all points. Where multiple duct is used, approved dowels shall be used. Ducts shall be laid to true alignment and grade and joints will be made with cloth and cement in best manner. There will be not less than 18 inches of cover over concrete.

202. Fiber conduit.—Where there are not more than two lines of duct in same trench, secondary circuits to buildings will be drawn in, in an approved screwed joint fiber conduit without concrete envelope. Inside diameter of conduit to be not less than 3 inches. Walls of fiber conduit to be at least $\frac{3}{8}$ inch thick.

203. Manholes.—Where abrupt changes of alignment occur, and where shown or required outside of tunnel, concrete manholes as per details shall be constructed, all material to be as specified before, and manholes to be properly drained. Build and drain junction boxes for connections as shown or where conditions require same.

204. Transformer pits and manholes.—Transformer pits shall be constructed in tunnel, and transformer manholes built as shown on sections, all properly constructed and drained as specified before.

205. Trenching.—Where possible, electrical mains will be in same trench, and alongside water mains, with at least 6 inches between casings.

206. Wires and cables.—All primaries in tunnel shall be three-conductor cables, varnished cloth or cambric-insulated, covered with double braid. Insulation shall be at least $\frac{3}{32}$ inch thick around each conductor, and with at least $\frac{3}{64}$ -inch insulation around all. In addition, the insulation shall be protected by heavy braid of approved thickness and finish. All primaries outside of tunnel shall be three-conductor paper insulated, lead-covered cables, with the exception of the wires supplying the main guardhouse and west receiving group transformers which will be two-conductor cable. Insulation

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shall be at least $\frac{3}{32}$ inch thick around each conductor and with at least $\frac{3}{64}$ -inch insulation around all. Lead sheath shall be at least $\frac{3}{32}$ inch thick, and shall consist of commercially pure lead, or an alloy of commercially pure lead and tin. Secondaries shall be three-conductor (except those feeding the receiving dormitories and guardhouses, which shall be two-conductor) paper-insulated lead-covered cables. Insulation shall be of the standard thickness for low tension work. Secondaries from transformers feeding Commandant's house and center circuit instruction building shall be lead covered in iron conduit, in tunnel. The iron conduit to extend into and to be cemented to the duct. Iron conduit to be cemented into section of duct before same is laid. Conductors larger than No. 0, B. & S. gauge shall be stranded. Lead shall be at least $\frac{3}{32}$ inch thick, and of quality specified for primaries. All conductors shall be of soft drawn copper, of at least 98 per cent conductivity. All sizes of conductors given on plans and mentioned in these specifications are Brown and Sharpe's wire gauge. All secondaries in buildings having basements shall be lead-sheathed cable run in iron conduits and all secondaries in buildings not having basements shall be run in ducts as per outside construction. Receiving buildings have no basements.

207. Joints and workmanship.—Care shall be exercised in drawing in cables. All bends in cable shall be made with long, smooth curves. Where cables leave ducts they shall be protected in an approved manner. All cables in manholes shall be protected with asbestos lap or board or tube covering. Only experienced cable splicers shall be used in making joints. Each section of multiple conductor cable shall be tested for continuity and grounds before making joint, and again after joint is finished. Joints shall be so supported as to remove all strain. Care shall be taken that all moisture at ends of cable is removed by approved methods before joint is made. Lead at ends shall be removed in a manner which will not injure insulation. Care shall be taken that when outer insulation is removed inner insulation shall not be injured. When working on one conductor care shall be taken that others shall not be bent so as to weaken insulation. After proper amount of lead and insulation has been removed, conductors shall be thoroughly tinned. A split copper connecting sleeve shall then be slipped on and thoroughly sweated to same by hot solder. Surplus solder shall then be removed. The conductor

will then be thoroughly insulated by approved tape or paper sleeve and tape to a thickness in excess of that used for cable insulation. The separate conductors shall then be brought together, interstice filled with jute or cotton tape to make round, and bound with tape to approved thickness. Hot insulating compound shall be applied during process to drive out all moisture. Lead sleeve shall then be slipped into position, with equal laps over lead sheathing and ends dressed down and secured by wiped joints. Lead sleeve will then be filled with hot insulating compound, and after joint has cooled, pouring holes will be covered with lead cap and soldered.

208. Transformers.—Transformers will be of subway type, 2300-230/115 volts, 60 cycle, to be oil insulated, single phase, connected in delta. Loads will be induction motors of 220 volts and incandescent and arc lamps of 110 volts. Transformer cases and cores shall be grounded with wire of ample size, not less than No. 6. Both the primary and secondaries of transformers shall be protected by fuse cut outs of an approved subway type. Boxes shall be arranged so that fuses may be withdrawn with cover if desired.

Cable Tests.

Factory Tests.

209. Primary cables.—Before shipment all lead-covered primary wires and cable shall be given the following tests; contractor to furnish all labor, power, instruments, observers, etc., required, but tests shall be under supervision and direction of the officer in charge.

210. Breakdown test.—6,250 volts alternating current for five minutes.

211. Insulation resistance.—Insulation resistance between one conductor and other conductors, and sheath shall be at least 50 megohms per mile. Insulation resistance to be measured after breakdown test and by voltmeter method.

212. Secondary cables.—Breakdown test shall be 1,250 volts alternating current for five minutes.

213. Insulation resistance to be at least 25 megohms per mile.

214. Rubber-covered, braided wire.—All rubber-covered, braided wire and cables shall conform to test requirements prescribed by National Electric Code.

Tests After Installation.

215. After installation, and before transformers are connected, all primary conductors shall be given a breakdown test of 5,000 volts for five minutes between conductors, and 5,000 volts for five minutes between conductors and sheath, or conduit.

20 216. All secondary circuits shall be given a breakdown test of 1,000 volts for five minutes between conductors and 1,000 volts for five minutes between conductors and sheath, or conduit.

Transformer Tests.

Factory Tests.

217. All the tests specified below shall be made under the supervision of and by methods approved by the inspector. Contractor shall furnish all power, labor, instruments and observers required for making these tests. Transformers shall be tested upon ten days' notice by the contractor to the Bureau of Navigation of his readiness to make tests. With this notice, contractor shall submit for approval the proposed methods of testing. At least one transformer of each size shall be tested for heating and regulation.

218. Heat test, full load.—Transformers shall be run at full load, normal voltage, for at least eight hours, on sizes larger than $7\frac{1}{2}$ K. W., and six hours on sizes $7\frac{1}{2}$ K. W. and smaller, or until all parts have reached a constant temperature. Temperature rise of windings, measured by resistance method, shall not exceed 45° C., and other parts shall not exceed 40° C. by thermometer, above the temperature of surrounding air, corrected to a standard temperature of 25° C., as recommended by the American Institute of Electrical Engineers. In case thermometer indicates a higher temperature on any portion of winding than shown by resistance method, the thermometer reading shall govern.

219. Heat test, overload run.—Immediately upon the expiration of full load test specified above, transformers shall be operated for at least two hours continuously and at an output of 50 per cent in excess of normal rating, and at the end of that time the rise in temperature in windings shall not exceed 55° C. by resistance method, and 50° C. on other parts by thermometer method, above surrounding air, corrected to a standard room temperature of 25° C., as recom-

mended by the American Institute of Electrical Engineers. In case thermometer indicates a higher temperature on any portion of winding than shown by resistance method, the thermometer reading shall govern.

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220. Insulation tests.—All transformers shall be tested for dielectric strength and insulation resistance. On such transformers as are tested for heating, these tests shall be made upon the expiration of the overload run specified above. An alternating electromotive force of 10,000 volts for one minute shall be applied between primary windings and core and secondary windings, and 4,000 volts shall be applied between secondary windings and core.

221. Insulation resistance.—Insulation resistance while hot shall be not less than one megohm between primary and secondary coils, and one megohm between windings and core.

222. Efficiency tests.—Tests shall be made on such transformers as directed, to determine the efficiencies at $\frac{1}{4}$, $\frac{1}{2}$, $\frac{3}{4}$, full and $1\frac{1}{4}$ load.

223. Also, tests to determine the core loss at no load, normal voltage shall be made. Efficiencies shall be not less than the following:

K.W. capacity	$\frac{1}{4}$ load.	$\frac{1}{2}$ load.	$\frac{3}{4}$ load,	Full load.	$1\frac{1}{4}$ load.
1.....	89.3	93.6	94.7	95.1	....
$1\frac{1}{2}$	91.2	94.6	95.3	95.5	....
2.....	92.1	95.1	95.8	95.9	....
3.....	93.9	96.0	96.5	96.4	....
4.....	94.4	96.5	96.9	96.9	....
5.....	95.0	96.9	97.3	97.3	97.1
$7\frac{1}{2}$	95.0	96.9	97.3	97.3	97.2
10.....	95.1	97.0	97.5	97.6	97.5
15.....	95.5	97.2	97.6	97.6	97.7
20.....	96.1	97.6	97.8	97.8	97.8

224. Regulation tests. Tests shall be made as directed to determine the regulation of transformers, both with unity power factor and with power factor of 85 per cent.

Regulation shall not be greater than the following:

K. W. capacity.	1.	$1\frac{1}{4}$.	2.	3.	4.	5.	$7\frac{1}{2}$.	10.	15.	20.
Regulation at 100% P. F.....	2.6	2.58	2.4	2.2	2.17	1.9	1.65	1.53	1.5	1.43
Regulation at 85% P. F.....	....	....	....	....	....	2.8	2.8	2.8	2.5	2.5

225. Examination of site.—Intending bidders are expected to examine the site of the proposed installation and inform

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themselves thoroughly of the actual conditions and requirements before submitting proposals.

226. Information.—For any further information needed by intending bidders, application should be made to the Chief of the Bureau of Navigation, or to the Commandant of the Naval Training Station, Great Lakes, North Chicago, Ill. Any discrepancies or omissions noted by intending bidders in plans or specifications should be promptly referred to the Chief of the Bureau of Navigation, Navy Department, Washington, D. C., for correction or interpretation before the letting.

Addenda.

Schedule of additions or deductions from the bid price under Item 1, in case any one or more of the following changes from the plans and specifications are made. All material and apparatus offered under the following specifications shall be listed in proposal under Item 3, and subdivided according to the following notation. Full plans and specifications shall accompany bids under these items. All under-drains and other items shall be as under Item 1. All specifications under Item 1, covering workmanship and tests to remain in force.

(a) Bidder may submit under this item the amount to be added or deducted from Item 1 in case the pipe covering specified below is substituted for the pipe covering specified under Item 1. For paragraph 157, substitute the following:

Hot-water mains outside of tunnel.—Hot-water mains and branches outside of tunnel to be covered with a round wooden casing, 2 inches thick, unlined; this casing to be made of selected white-pine staves, free from sap and loose knots, each stave to be tongued and grooved its entire length, and to have a mortise and tenon not less than 4 inches long cut on each end. These staves to be assembled, bound spirally with galvanized steel wire under tension sufficient to imbed the wire in the wood, and the complete casing then rolled in hot pitch and then in sawdust, and mortise and tenon painted with creosote. The inside diameter of the casing to be such as to provide for an air space surrounding the iron pipe of not less than 1 inch, and the iron pipe to be supported concentrically in the casing by means of suitable cast-iron guides and rollers. Attention is called to the fact that if the above specification is substituted for paragraph 157, it must also be

substituted for paragraph 186, relating to vacuum returns outside of tunnel.

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For paragraph 176, substitute the following:

Steam mains outside of tunnel.—Steam mains and branches outside of tunnel to be covered with a round wooden casing, 4 inches thick, lined; this casing to be made of selected white-pine staves, free from sap and loose knots, each stave to be tongued and grooved its entire length, and to have a mortise and tenon not less than 4 inches long, cut on each end, respectively. These staves to be assembled and bound with galvanized steel wire, under tension sufficient to imbed the wire in the wood, and the complete casing to be rolled in hot pitch and then in sawdust, and mortise and tenon painted with creosote. Casing to be lined with charcoal tin plate, and sheet asbestos, asbestos sheet to be at least 1/16 inch thick, and may be placed directly on iron pipe and wrapped with copper wire, or may be placed between the tin lining and wooden casing. Covering for hot water and steam mains and branches in manholes, basements, valve boxes, etc., to be the same as specified under Item No. 1. All work on casing and covering under (a) shall conform to standard specification of the American District Steam Company, Lockport, N. Y.

(b) Bidder may submit under this item the change in cost from Item 1 in case steam mains only, outside of tunnel, are covered as specified under item (a).

(c) Bidder may submit under this item the change in cost from Item 1, in case the pipe covering specified below is substituted for the pipe covering specified under Item 1. For paragraphs 157, 176, and 186, substitute the following: All mains and branches outside of tunnel to be rearranged and laid in standard split vitrified-tile conduit, either one or two tile pipe being used as is necessary; tile conduit to consist of top and bottom half sections, baked as a unit, then separated. Conduit shall be laid accurately to grades determined by batter boards. Split joints to be made up with neat cement and other joints filled and finished to bevel with 1 to 1 cement mortar. Pipes shall be supported by means of approved rolls, which shall be placed not farther than 12 feet apart for 14-inch pipe; 15 feet apart for 3½-inch pipe, and 18 feet apart for larger sizes. Roll frames and anchors shall be firmly set in concrete and supported in a tile T. Longitudinal joints after being made up, shall be covered with ½ inch of cement plaster extending 2 inches above and below joint. Size of conduit will be such that there will be not less

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than 3 inches between pipe and conduit, and not less than 1 inch between any two pipes. Space between pipes, and between pipes and conduit shall be filled with an asbestos-sponge insulation of approved quality and composition well packed into place. Where vacuum return is run in separate conduit no insulating filling will be required. Note that this arrangement will materially reduce the amount of trenching required. The trench to be 20 inches wider than the interior diameter of conduit. All mains and branches in manholes, valve-boxes, basements, etc., shall be as specified under Item 1. All work on this casing and covering shall conform to standard specifications by the Johns-Manville Company, Chicago, Ill.

(d) Bidder may submit under this item the changes in cost from Item 1, in case the pipe covering specified below is substituted for the pipe covering specified under Item 1. For paragraphs 157, 176, and 186, substitute the following: All mains and branches outside of tunnel to be laid in a concrete box conduit, consisting of a 3½-inch thick concrete floor laid in place, and not less than 2-inch thick moulded side slabs, which thickness shall be increased for the larger sizes of conduit, and with not less than 3-inch thick (at center) reinforced moulded roof slabs up to 24-inch span, and 4-inch for 36-inch span, and other spans between 24-inch and 36-inch in proportion. Floor and roof to have shoulders to take side thrust of walls. Roof shall be designed for a load of 750 pounds per square foot. Side walls shall be joined to floor with Portland cement joint, and to roof with an approved plastic cement joint. A 2-inch by 8-inch plank shall be placed along
21 sides of conduit at bottom to prevent displacement of side slabs during construction. Conduit shall be drained by gutter and floor drains. Roof shall be waterproofed as specified for tunnel roof. Pipes shall be supported by approved rolls. Pipes shall be covered with sectional covering as specified below. All mains in conduit to be covered as specified for mains in tunnel under Item 1. Vacuum return mains will not be covered, but shall be painted as specified. Size of conduit shall be shown on plans submitted with bid, and shall be such that ample clearance shall be left between pipe coverings, and between pipe coverings and concrete. Smaller pipes may be suspended from painted steel T-bars by approved hangers if desired. Bidder should note that elevations given for vacuum return piping must be maintained. In case the vacuum return is so deep that it is impracticable to carry this in same conduit with other mains it shall be

separate and covered with vitrified tile split at all couplings and cemented as in item (c). No sponge felt covering to be used on vacuum return. All concrete in this conduit to be 1-2½-5 mixture. All work on this concrete conduit shall be equal to the standard specifications, sizes and methods of W. H. Schott, Chicago, Ill.

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(e) Bidder is requested to submit under this item the changes in cost from Item 1, in case paper insulated lead-covered cable, without iron conduit, supported by cast-iron racks not over 5 feet apart, is substituted for the primary conductors in tunnel, as specified under paragraph 198 and 206.

(f) Bidder is requested to submit under this item the change in cost from Item 1, in case the conduit and cables for arc circuits are installed in accordance with the plan marked C-F and this specification. Wires in tunnel to be run in iron conduit and to conform with all provisions and tests specified for primary conductors in tunnel, under Item 1, with the exception that cables will be two conductor, and that each wire will be insulated with cambric or varnished cloth 3/32 inch thick, with 3/64 inch over both, then a double braid of approved thickness and finish. Circuits outside of tunnel to conform with all provisions and tests specified for primary conductors, outside of tunnel, under Item 1, with the exception that cables will be two conductor instead of three conductor. All junction and handhole boxes, where required, shall be as specified under Item 1. At points where lamps will be located, the conduit shall be brought to surface of ground with a 3-foot radius bend of fiber conduit in 3-inch concrete casing and cables left capped with suitable approved terminals extending 6 inches above surface. At end of duct space between cables and duct shall be closed in an approved manner, and terminal heads and conduit shall be temporarily protected by a wooden box nailed to stakes. No poles or lamps are included in this contract.

(g) Bidder is requested to submit under this item the change in cost from Item 1, in case paper insulated lead-covered cable, without iron conduit, supported by cast iron racks not over 5 feet apart, are substituted for the arc conductors in tunnel as specified under paragraph (f) of this agenda. All other provisions of paragraph (f) to remain in force.

(h) Under this item bidder may submit the changes in cost from Item 1, in case any apparatus, material, or equip-

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ment differing from that specified is submitted for consideration. Bidder to supply full plans and detail specification calling particular attention to points varying from this specification, and all tests, guarantees and general requirements, other than details of construction described hereinbefore, to remain in force. In case a proposal is submitted involving a substitution of more than one item, each item shall be accompanied by its corresponding change of bid price, with full details.

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Testimony of William T. Abbott.

23 WILLIAM T. ABBOTT, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Q State your name, residence and occupation?

A William T. Abbott; Chicago, Illinois; Vice-President of the Central Trust Company of Illinois.

Q You are familiar with the contract between the United States Government and W. H. Schott for certain work at the Naval Training Station?

A I am.

Q Will you state in a general way your connection with the final settlement of that contract?

Mr Hopkins: I object to that question.

Mr McKenzie: I will take out the word "settlement," if that is the objection.

Mr Hopkins: I object to that. Up to date there is no evidence it is material at all. I think his question should make some connection and show some materiality.

The Court: Your idea is to show there was a time when there was a final settlement?

Mr McKenzie: Yes.

The Court: To show the action was proper, is that the idea?

Mr McKenzie: Yes.

The Court: Objection overruled.

And thereupon the court allowed an exception to said
24 ruling.

A The Central Trust Company of Illinois was appointed receiver, afterwards trustee, of W. H. Schott, and of the Schott Engineering Company. The work of completing the contract at the Naval Station was carried on by the receiver, and subsequently by the trustee. The work was officially—

Mr Hopkins: Trustee of the Schott Engineering Company?

A Of the Schott Engineering Company. The work was officially completed in September, 1910, and the payment—

Mr Peffers: "Officially completed," I move to strike that out. Let him state what the facts are.

The Court: Strike out the word "officially."

Mr Hopkins: I object to the word "completed." That is a conclusion on his part and may not agree on some other particulars. Let him state the facts, and the court and jury can determine that question.

The Court: I don't suppose Mr. Abbott knows the facts. You have no facts about the completion of the work, have you?

A Yes, sir.

The Court: State the facts then.

A The facts are the work had been practically completed for several months prior—

Mr Hopkins: That I object to. I object to his using the

testimony of
William T.
Abbott.

word "completed." Mr. Abbott is a lawyer, and a good one too, and he ought to know better—

25 A Thank you, Senator.

The Court: He didn't say anything about his being a lawyer.

A No, I was going to conceal that from the jury.

The Court: Now, Mr. Abbott, state in a simple form, so Mr. Hopkins can understand, what you mean by "completed"?

A Yes, your Honor. There was very little work done after May and June of that year. When I stated a moment ago it was officially completed in September, I referred to its completion or rather to its finishing and its acceptance by the Government, as evidenced by letter from the Admiral in charge.

Mr Hopkins: I object to that, and ask it be stricken out, because the letter is the best evidence.

The Court: Objection overruled. He has not stated the contents of the letter.

Mr Hopkins: I beg your Honor's pardon, I think he did. Just read the answer, that is the point of my objection.

Mr McKenzie: We will introduce the letter.

Mr Hopkins: That is no reason why he should state the contents of the letter. Read the last answer.

(Answer read).

The Court: Strike out all you read there, "when I stated it was officially completed," beginning with the word "when." Just state what you know about the completion of the contract.

26 A The work was completed and accepted in September, 1910. Then there was some delay in reference—or delay in making payments, the payments which were then due, as result of which I went to Washington in February, 1911, and discussed the matter personally with the Naval Department. Shall I go on?

Mr McKenzie: If you will.

A On the morning of February 6th I saw Mr. Winthrop, Assistant Secretary of the Navy, and explained the situation to him, that we were desirous of closing the estate—

Mr Hopkins: I object to the conversation.

The Court: Yes, just state what was done—whether payment was made?

A Mr. Winthrop, after a few moments talk, turned me over to a man in the department who had personal charge of the

Washington end of the naval station matters. It is very hard to tell this without any conversation, or without at least the substance of the conversations.

The Court: Get down to the payments.

A Yes, your Honor. The fact was that at that time as against a payment due from the Government as the trustee claimed in the neighborhood of fifteen thousand dollars, the department was claiming at that time damages and penalties—

Mr Hopkins: I object to that. That is no part of the case, no part of the evidence.

Mr McKenzie: Just a moment. We consider that the payment is not the question, it is the question when the parties came to an agreement as to the amount due, and that is what Mr. Abbott is trying to explain, the time of their coming together and agreeing upon the amount due, and I insist we should be allowed to explain when that took place.

The Court: I will take it subject to objection. Go on and state what was said.

And thereupon the court allowed an exception to said ruling, to the defendants.

A I discussed the matter all day of the sixth with the man whom Mr. Winthrop referred me, and they finally—or he, representing the department, finally agreed the Government could not insist upon any of this twenty thousand dollars for penalties and damages except as to two items. May I say here, just a moment, we finally on that date, on the sixth, got down to the matter of the two items, one of \$914.75, and the other of \$850.00. I then prepared a letter to the Department, which bears date of February 6th, which I had written by a public stenographer on the evening of February 6th, but which I delivered to the naval department on the morning of February 7th. Outside of that letter, I stated to the man in charge, and subsequently to Mr. Winthrop, Assistant Secretary, that I thought that the item of \$850.00 should not be charged against us, because the items of labor involved in that were performed by regular employes, and that the item of \$914.75 I was willing to allow wholly or in part, that I believed the government should have some allowance there, because it was for work and inspection for which special men were employed in the latter part of the work, but I asked them to reduce that amount of \$900 to about \$600. I then returned. The matter was left in that shape, so far as that

Testimony of
William T.
Abbott.

testimony of
William T.
Abbott.

man was concerned. I went back to Mr. Winthrop on the morning of the seventh a little before noon, and I stated to Mr. Winthrop that I had concluded to allow \$914.75 if we had to, but I hoped he would reduce it to about \$600, and I would only make that allowance in consideration of our receiving a voucher not later than the fifteenth to enable us to make our report, which was due to the bank on the sixteenth. That was the situation when I left Washington, that is, I didn't know whether the government was going to deduct \$914.75 or approximately \$600. I returned to Chicago, arriving here on the morning of the eighth. On the morning of the ninth I received from C. D. Thurber, civil engineer of the United States Navy, who was then in charge of matters at the naval station, a letter dated February 8th, in which was enclosed a voucher for \$9,744.60, which was the amount that we had agreed upon less the retained percentage of five per cent, and deducting \$914.75 which we had discussed in Washington.

Mr Hopkins: What was the aggregate of the five per cent retained by the government?

A Beg pardon?

Q What was the aggregate of the five per cent retained by the government?

A The five per cent retained, and which was paid in October, 1911, was \$6,308.01.

Mr McKenzie: Q What was done with that voucher after you received it?

A The voucher was signed by W. H. Schott. The voucher was made out to W. H. Schott and was signed by him, and by me returned to Mr. Thurber in a letter of mine dated February 10th. My impression is that I was unable to get Mr. Schott on the ninth, and returned the voucher signed by W. H. Schott on the tenth.

Q Then the voucher was returned to the government on the ninth?

A On the tenth.

Q Do you know what the purpose of Mr. Schott's signature to that document was?

A All papers which came to us, either as receiver or as trustee, in connection with this contract were addressed to W. H. Schott.

Mr Hopkins: I object to that, if your Honor please.

The Court: Objection overruled.

Whereupon the court allowed the defendants an exception to said ruling.

A Were addressed to W. H. Schott, care of Central Trust Company of Illinois, and all vouchers received by way of partial payments on the job, as the work progressed, were similarly sent and similarly signed by W. H. Schott.

30 Mr McKenzie: Q I don't understand why that voucher should be signed by Mr. Schott, a voucher payable from the government to Schott?

A The department didn't recognize anyone in connection with the job except W. H. Schott, but in order that the work—

Mr Peffers: Wait a moment, that is immaterial from our standpoint, if the court please.

Mr Hopkins: And we move to strike that out.

The Court: Of course, that is a conclusion from what he has already stated. It may be stricken out. These vouchers are receipts practically, are they not, Mr. Abbott?

A Yes, sir.

Mr McKenzie: Q Have you those papers?

Mr Peffers: If the court please, he is attempting to prove, I suppose, a final settlement. This has nothing to do with that.

The Court: No, this has nothing to do with that. If you have the papers and vouchers and so on, of course, they would be the best evidence.

Mr McKenzie: Q Mr. Abbott, we hand you a certified copy, certified by F. D. Roosevelt, Acting Secretary of the Navy, contract and voucher number 21, covering contract for distributive mains, between the United States and W. H. Schott, and will ask you whether or not—

Mr Hopkins: Let us look at it before you hand it to him.

Mr McKenzie: Q (Continuing) And ask you whether 1 or not that is the voucher to which you have referred in your testimony?

A I should say that is a correct copy.

Q Will you state again when that voucher was signed by Mr. Schott?

Mr Hopkins: I object to that, unless he has some independent memory.

Mr Peffers: Don't the papers show that?

The Court: I think he can answer that.

Whereupon the court allowed the defendants an exception to said ruling.

Testimony of
William T.
Abbott.

A It was either late in the afternoon of February 9th or early on February 10, 1911.

The Court: Q What is the amount of that?

A \$9744.60.

The Court: The same amount you testified to?

A Yes, sir.

The Court: Do you claim that is the date of the final payment, Mr. McKenzie?

Mr McKenzie: The final settlement was the date when they came to an agreement, and not the date of the payment.

Q Do you know whether or not this voucher was paid?

A It was.

Q About what time?

A I think on February 17th.

Mr McKenzie: I offer this certified copy in evidence and ask it be marked Plaintiffs' Exhibit 2.

Mr Peffers: Objected to, if the court please.

32 The Court: It may be received.

Mr Peffers: The court understands the point I make, and that is the witness has said there was still \$6,000.00 held back until six months longer, subject to repairs and any expenses that might be incurred between the time of these negotiations in 1911 and subsequent, in October—

The Court: You refer to the five per cent?

Mr Peffers: I do. There are clauses relating to it in the contract.

The Court: Yes.

Mr Peffers: The court admits it?

The Court: Yes.

To which ruling of the defendant Illinois Surety Company then and there duly excepted.

Whereupon the court allowed the said defendant Surety Company an exception to said ruling.

(Which said document so offered and received in evidence was thereupon marked Plaintiffs' Exhibit 2, and is in the words and figures following, to-wit):

33

PLFS EX 2.

Plaintiffs'
Exhibit 2.

Copy.

Contract Voucher

Voucher No. 21
Contract Distribution Mains.
The United States.

Quadruplicate (Third)
Navy Department
Bureau of Navigation.

To

W. H. Schott, Dr
(Address) Chicago, Ill.

Appropriation: (General title) "Naval Training Station,
Great Lakes, Buildings."
(Subtitle) "Heating & Electrical Mains & Conduits."

(Use only language of schedule of prices)

190—Contract Price. 124188.73

Addition:

Supplemental agreement No. 1 2823.60

Addition:

Per letter #13506, dated May 27, 1910, for
repairs to vacuum lines on temporary tres-
tle, account of pipes freezing. 62.56

127074.89

Deduction:

Cost of inspection from July 30, 1909 to
October 1, 1910. 914.75

126160.14

Less 5 per cent reservation until Oct. 1, 1911 6308.01

119852.13

Less amount previously paid 110107.53

Amount due \$ 9744.60

Bill of Exceptions.

Plaintiffs'
Exhibit 2.

Naval Training Station, North Chicago, Feb. 8, 1911.

Having inspected the material and labor above charged, I certify that they are of good quality and in all respects in conformity with the requirements of contract No. 14, dated July 30, 1908, and that they have been received under the provisions of said contract.

C. D. THURBER,
*Civil Engineer, U. S. N.,
In Charge of Engineering Work.*

Naval Training Station, North Chicago, Feb. 8, 1911.

Approved for Nine Thousand seven hundred and forty four Dollars and sixty cents.

A. Ross,
Rear Admiral, U. S. N. Commandant.
Navy Department, Bureau of Navigation,

\$9744.60

Feb. 14, 1911.

Approved for Nine thousand seven hundred & forty four Dollars and sixty Cents, payable at the Disbursing Pay Office, North Chicago from the above named appropriation.

H. B. WILSON,
Acting Chief of Bureau.

DAD

Received 190.., from Pay
U. S. N., Dollars and Cents, in full
of the above bill, which bill is hereby certified to be correct.
Certified correct & just, payment not received.

W. H. SCHOTT.

Paid by check No. 8996, dated Feb 17 1911 on the Assistant Treasurer of the United States at Chicago, Illinois, in favor of principal.

THOMAS D. HARRIS,
Paymaster, U. S. N.

34 Mr McKenzie: Q I hand you a letter dated October 6, 1910, addressed to W. H. Schott, and signed "A. Ross, Rear Admiral, U. S. Navy," and ask you whether or not you are familiar with Admiral Ross' signature?

A I know Admiral Ross' signature.

Q Is that his signature?

A It is.

Testimony of
William T.
Abbott.

Q You handed me this letter?

A Yes.

Q How did this letter reach you?

A It is part of the files of the Central Trust Company of Illinois, and as trustee of the Schott Engineering Company it reached us by reason of the fact that all letters to W. H. Schott pertaining to this contract was sent in our care so that attention might be given to them.

Mr McKenzie: I offer this letter in evidence and ask that it be marked Plaintiffs' Exhibit 3.

The Court: On this question of time?

Mr McKenzie: Yes.

Mr Peffers: I object to it. The letter itself states and makes reservation with reference to the cost of any repairs that might accrue within a year.

The Court: That is the five per cent?

Mr Peffers: It says, "the date of completion was September 24th. Any defects which shall arise during a period of one year from said date shall be performed by you under the provisions of paragraph 45 of the specifications forming a part of your contract for this work." It has no bearing on the question of final settlement.

The Court: On the theory we have been going on, it does have a bearing.

Mr Peffers: Possibly.

The Court: So that it may be admitted subject to objection.

To which ruling of the court the defendant Illinois Surety Company then and there duly excepted.

Whereupon the court allowed the defendant Surety Company an exception to said ruling.

(Which said document so offered and received in evidence was thereupon marked Plaintiffs' Exhibit 3, and the same is in the words and figures following, to-wit):

Plaintiffs'
Exhibit 3.

36

PLTFS EX 3.

Copy.

Address

Naval Training Station
Great Lakes, North Chicago, Ill.

D-B-1

And refer to No. 14748

Contract No. 14—

General.

Department of the Navy
Bureau of Navigation
U. S. Naval Training Station, Great Lakes,
North Chicago, Illinois.

October 6, 1910.

Sir:—

1. You are informed that the work and material called for in your contract of July 30, 1908, with the United States, for the installation at this Station of heating and electrical distributing mains and concrete tunnel have been inspected and found to be satisfactory for final acceptance.

2. The date of completion was September 24, 1910. Any defects which shall arise during a period of one year from said date shall be performed by you under the provisions of paragraph 45 of the specifications forming a part of your contract for this work.

Very truly yours,

(Signed) A. Ross,
Rear Admiral, U. S. Navy,
Commandant.

W. H. Schott,
C/o Central Trust Co. of Ill.
Chicago, Illinois.

37 The Witness: May copies be substituted for these originals after the originals have served their purpose?

The Court: I suppose there is no objection to copies being substituted?

Mr Hopkins: No, that is all right.

Mr McKenzie: Q I hand you a letter dated February 8, 1911, addressed to W. H. Schott, and signed "C. D. Thurber, Civil Engineer, U. S. Navy," and I will ask you whether you are familiar with Mr. Thurber's signature?

A Yes, I know Mr. Thurber's signature.

Q Is that the letter to which you referred in your testimony sometime ago, as being received on the 8th or 9th of February, 1911?

A That is the letter accompanying the voucher to which I referred.

Q That is the signature of Mr. Thurber, Civil Engineer, U. S. Navy?

A Yes sir.

Mr McKenzie: I offer this letter in evidence, and ask that it be marked Plaintiffs' Exhibit 4.

Mr Peffers: We object to this letter.

The Court: It may be admitted.

To which ruling of the court the defendant Illinois Surety Company then and there duly excepted.

Whereupon the court allowed the defendant Illinois Surety Company an exception to said ruling.

(Which said document so offered and received in evidence was thereupon marked Plaintiffs' Exhibit 4, and the same is in the words and figures following, to-wit):

Testimony of
William T.
Abbott.

Plaintiffs'
Exhibit 4.

38

PLTFS' EX 4.

Copy.

Address

1-1

Naval Training Station
Great Lakes, North Chicago, Ill.
And refer to No. 15603

Subject

Contract No. 14—

Estimates.

U. S. Naval Training Station, Great Lakes,
North Chicago, Illinois.
February 8, 1911.

Sir:—

1. Accompanying this letter is Voucher No. 21, of even date, for \$9,744.60, in your favor, said sum representing the amount now due under your contract for distributing mains, etc., installed at this Station.

2. It is requested that this voucher be signed by you under the certificate "Certified Correct and Just, Payment not Received," and all copies of this voucher return to this Station as early as may be practicable.

Very truly yours,

(Signed) C. D. THURBER,
Civil Engineer, U. S. Navy.

Mr. W. H. Schott,
c/o Central Trust Company of Illinois,
152 Monroe Street,
Chicago, Illinois.

(Enclosure)

39 Mr McKenzie: Q Mr. Abbott, where is the Naval Training Station?

A It is a new station on the Northwestern Railroad, some distance north of Chicago, called the great lakes, it is just south, a little ways south of the North Chicago Station.

Q It is in Lake County, Illinois?

A You can't prove it by me.

The Court: He is a lawyer.

A Yes, I am not a geographer.

Mr McKenzie: Q Just south of Waukegan, Illinois?

A Yes, sir.

The Court: I presume the jurors know where it is.

Mr Wyeth: I suppose the court takes judicial notice it is in this district.

The Court: Yes.

Mr McKenzie: Q Will you state whether or not, to your knowledge, any suit was ever brought by the Federal Government on this contract and bond?

A Not to my knowledge. I will say positively none was ever brought to which the receiver or trustee was a party.

Q I understood you to say the Central Trust Company was appointed by this court first receiver and then trustee both of W. H. Schott and the Schott Engineering Company?

A That is correct.

Q Have those estates been closed yet?

40 A They have not. I would not say positively with reference to the personal estate, I don't recall that; the other I know has not.

The Court: Q You mean by "personal," Schott?

A W. H. Schott personally.

Mr McKenzie: That is all. You may cross-examine.

Cross-Examination by Mr. Hopkins.

Q What you have testified to before the court and jury had reference to the completion of the buildings, did it not, up there?

A The completion of the work covered by the contract.

Q And the payment?

A Yes, sir.

Q It was a matter between you and the Federal Government, was it not?

A Yes, sir.

Q It had nothing to do with any of these claimants that are claiming something in this lawsuit?

A Absolutely nothing.

Q Absolutely nothing?

A I don't think I ever knew of their existence until afterwards.

Q What is that?

A I don't think I ever knew of their existence until afterwards.

Q All you are interested in was to see that the contract—that the Federal Court had authorized you as receiver or trus-

testimony of
William T.
Abbott.

tee of the Schott Engineering Company—was completed in accordance with the terms of the contract?

41 A I was interested in getting all the money for the creditors of the estate, that was my sole interest.

Q That is the point, just as I put it, that is correct?

A My answer is correct.

Q I don't think so.

A I don't think it differs materially.

Q Just read my question.

(Question read.)

Q And that you got as much money from the government as you could?

A Yes, sir.

Q That was your only interest, wasn't it?

A Why, certainly.

Q And that is all?

A And I will say as quickly as we could.

Q I won't object to that. I believe that is all.

A All right.

Mr Hopkins: That is all.

The Court: As I understood you to say, five per cent was later paid?

A Five per cent retained, the percentage, under the contract, was later paid in October, 1911.

Q Paid in full?

A Paid in full, that was in no wise changed on the other settlement.

Q What is that?

A That is just the same, whatever that other settlement was.

Q So no repairs had to be made, or anything of that kind that had to be done by the trustee?

A No, sir.

42 Mr Hopkins: Just a question or two further that comes to my mind.

Q Were you present when Judge Landis, sitting here in this court, authorized the receiver to go on and complete the contract?

A No, I was not, Senator.

Q As receiver of the Schott Engineering Company?

A No, the appointment was made some two or three months before I became connected with the bank.

Q It was the receiver of the Schott Engineering Company
that completed the contract?

Testimony of
William T.
Abbott.

A No, the trustee completed it.

Q Well who, the trustee of the Engineering Company?

A Yes, sir.

Q Now, did you represent the Central Trust Company in
all of the matter?

A Well, after I became connected with it—

Q Yes.

A It was under my charge.

Q Do you remember about Judge Landis requiring the
trustee to send letters out to all of the creditors to see whether
they would approve of the Trustee of the Schott Engineering
Company completing the contract?

Mr McKenzie: I object to this as not cross-examination.

The Court: It is not cross-examination.

Mr Peffers: If the court please, I have a memorandum
where that he said the work was carried on by the Schott En-
gineering Company.

3 The Court: Yes, but that has nothing whatever to do
with what the creditors may have done, what position
they took.

Whereupon the court allowed the defendants an excep-
tion to said ruling.

Mr Hopkins: Q I will ask you if any letters came to you,
as custodian of the Schott Engineering Company, from any
of the creditors in this suit, touching the subject of com-
pleting the contract by the Schott Engineering Company, or
its representative in bankruptcy?

Mr McKenzie: I object to that question.

The Court: I think, in order to save time, you may answer
that question.

A This whole matter of continuing the work by the re-
ceiver and by the trustee was settled and under way before
I became connected with the bank, so have no personal knowl-
edge of these things.

Mr Hopkins: Q Have you got these letters in your pos-
session?

A No, sir.

Q Do you know where they are?

A No, I do not.

Q Have you ever seen them?

A I never have.

Q Do you know whether they were left with you or with

Testimony of
William T.
Abbott.

Judge Pam, who was the attorney for the trustee at that time?

A I know they were not left with Judge Pam. We are the custodians.

44 Q Do you know if there were any such letters?

A I don't know if there were any such letters, no.

Q Do you know inquiry has been made for them?

A Yes, I know I made very diligent search, for counsel on both sides of this case, to find those letters.

Mr Hopkins: That is all.

The Court: Q And you have never found them?

A I have never found them.

The Court: That is all.

Mr McKenzie: That is all.

Testimony of
Ralph E.
Church.

RALPH E. CHURCH, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Q State your name, residence and occupation?

A Ralph E. Church; attorney-at-law; 72 West Adams street. I am with Knapp & Campbell.

Q You have had charge for the John Davis Company of the claims against Schott in this suit?

A Yes, sir.

Q And also the Universal Portland Cement Company?

A Yes, sir.

Q Will you state what search you have made for the original orders on the contract covering the Universal Portland Cement Company's claim in this suit?

A I have been familiar with this suit since the question first came up, of suing on the bond, and I have made a
45 search through the various files in our office, in our law office, and the files of the Universal Portland Cement Company, and made inquiry from the various officers of the Universal Portland Cement Company personally and by letters, and an attempt to locate the original order from Schott in ordering material from the Universal Portland Cement Company, and also any contracts, contracts between the two people, but have been unable to find the same. I have done the same thing with reference to the John W. Davis claim. I have made inquiry of the various officers of that company.

and made the same diligent search for the orders and any contract bearing on the same. It is my conclusion—

Mr Hopkins: Never mind your conclusion.

A Well, it is my judgment—

Mr Hopkins: Never mind your judgment either.

A And I find that these orders and contracts are lost.

Mr McKenzie: Q That would apply also to any orders, if any, received from the Schott Engineering Company?

A Yes, just the same.

Q Who had charge of this matter originally in your office?

A Mr. C. C. Gilbert, who is now at Fort Beard in Mexico in a tuberculosis hospital, and has been there for a little over a year, I believe.

Q They were originally in his charge?

A Those orders and these files in this case were originally in his charge, he had the handling of all those things.

Mr McKenzie: That is all, you may cross-examine.

Cross-Examination by Mr. Peffers.

Q Did you make any examination in the offices of the National Tube Company, at Pittsburgh, for these files, or the John Davis Company?

A I did not.

Q It is a fact, is it not, that all the papers and files of the John Davis Company were turned over to the National Tube Company?

A It is my understanding all those files were kept here in the Commercial National Bank Building, in the same offices as our law department. The inquiry made was inquiring of the various officers who would have supervision of those files here.

Q What officers did you inquire of, of the John Davis Company?

A Of the John Davis Company, which is connected with and now known as the National Tube Company.

Q As a matter of fact, a large number of papers and records of the John Davis Company were sent to Pittsburgh, isn't that a fact?

A I don't know it to be a fact, it is my understanding—

Q Wait a minute, what do you know about it yourself?

Mr Hopkins: He don't know anything.

testimony of
Ralph E.
Church.

Mr Peffers: Q What do you know yourself?

A I can't answer your question intelligently.

Q When you say that you cannot find them in the office
47 of the John Davis Company here, you were relying on
what somebody told you, isn't that the fact?

A Why—

Q Isn't that the fact? Just answer the question.

A It is not the fact.

Q Were you not relying upon what somebody told you in
the office?

A It is not a fact.

Q What's that?

A No, sir.

Q Did you yourself go to the office of—did you yourself
go to the John Davis Company's offices and make an exam-
ination of the record?

A I can't answer your question. You say when I went to
the John Davis Company's office—

Q Yes, then did you yourself go through those files?

A I have gone through the various files, all they have
given to us, and attempted to find these orders, and other
files.

Q Then you rely on what somebody else led you to be-
lieve?

A Not entirely.

Q You went through what the officers handed you, isn't
that the fact?

A I relied on the officers pointing out the files in a great
many respects—

Q Yes.

A (Continuing) Telling me where the files were, and by
letters from them, statements made by them in answers to let-
ters of mine, letters to them.

Q Now, Mr. Church, you don't know of your own knowl-
edge what part of the files of the John Davis Company
48 were sent to Pittsburgh or not, do you?

A Letters are written between the two offices at all
times—

Q Wait a minute, do you know of your own knowledge
what part of the records of the John Davis Company were
sent to Pittsburgh?

A I am not the custodian of those files.

Q Then you don't know?

A I do know those orders are lost.

Mr Peffers: I ask to strike out the last statement of the witness.

Testimony of
Ralph E.
Church.

The Court: It may be stricken out.

Mr Peffers: Q Of course, you never went to Pittsburgh and looked into the files of the National Tube Company?

A No, I didn't think it was necessary.

Q As a matter of fact, the National Tube Company have taken possession of all the records and files, haven't they?

A Of all the records and files?

Q Of the original John Davis Company.

A As a matter of fact, all the records bearing on this case were supposed to be left in the office of Knapp & Campbell.

Q Were supposed to, but you don't know whether they all were or not?

A Well, you never know anything for certain.

Q That is all, we will excuse you then, Mr. Church.

49 JOHN W. McKEE, called as a witness on behalf of the plaintiffs, having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Testimony of
John W.
McKee.

Q State your name and residence?

A John W. McKee; Pittsburgh, Pennsylvania.

Q What is your relationship to the National Tube Company?

A Assistant Treasurer, National Tube Company.

Q Mr. McKee, will you state what efforts you have made to find the orders from W. H. Schott or the Schott Engineering Company to the John Davis Company for material for the naval training station?

A I have made a complete search of the Davis Company records that were sent to Pittsburgh; I have also made a complete search of what records were left in Chicago, and no orders of W. H. Schott or the Schott Engineering Company could be found.

Mr Hopkins: Q You don't know then you had any dealings with the Schott Engineering Company or Schott either?

A Well—

Mr McKenzie: Q What records did you find?

A I found the Davis Company ledger and that shows the account—

Testimony of
John W.
McKee.

Mr Hopkins: I object to that unless they produce the book.

The Court: Yes.

50 Mr McKenzie: Q State what you found, not what they show.

The Court: You found the ledger you say?

A I found the Davis Company ledger, the Davis Company originally binders covering the billing of this material, the original John Davis Company order forms containing the material that was billed and contained in the binders, that is the order form, John Davis Company order forms, and the books which contain the original charges, and the ledger.

Mr McKenzie: Q You found certain correspondence, didn't you?

A I found some miscellaneous correspondence, yes.

Q Have you searched both in Pittsburgh and in Chicago?

A I have searched in Pittsburgh and Chicago thoroughly.

Q And you are unable to find the original orders?

A Yes, I was unable to find the original Schott orders.

Mr McKenzie: That is all.

Mr Hopkins: We don't care to cross-examine.

No cross-examination.

Testimony of
John D.
Hibbard.

51 JOHN D. HIBBARD, called as a witness on behalf of the plaintiffs, being first duly sworn, was examined in chief by Mr McKenzie, and testified as follows:

Q State your full name and residence?

A John D. Hibbard; 4931 Lake avenue.

Q Chicago?

A Yes sir.

Q And you were President of the John Davis Company—

A Up to 1909, the first of May.

Q —for several years before that?

A Several years prior to that.

Q Do you know Mr W. H. Schott?

A I do.

Q You have been selling material to W. H. Schott a long time?

A For a number of years.

Q In August, 1908, and that would be true for several

months before, you were a member of the Creditors' Committee which was in charge of Mr Schott's affairs?

A I can't say just now when that committee was appointed, but I believe it was several months prior to that.

Mr Hopkins: Prior to what date?

A Prior to August 1st, 1908.

Mr McKenzie: Q Do you recall whether or not the question of the contract involved in this suit between Schott and the government was submitted to the Creditors' Committee of which you were a member?

A I am quite sure it was discussed.

Q Did you have any discussion or any conversation with Mr Schott with reference to the sale of material for this
52 contract by the John Davis Company?

A I did.

Q What was the substance of that conversation?

A In what way? What do you refer to particularly?

Q Was there any conversation between Mr Schott and you with reference to the sale of this material, and if so, what was it in a general way?

A Why, we were to sell him the material under a general agreement, understanding, with him, that he was responsible for the contract,—I don't know just exactly what you want?

Q Was there any agreement with reference to the manner of the payment of the fund from which this material that the John W. Davis Company supplied, was to be paid?

A It was to be paid out of the requisitions which were paid him by the government for this work.

Mr Peffers: When were these conversations?

Mr McKenzie: Q About what time were these conversations?

A I should say after it became apparent Mr Schott was going to get this contract.

Q About what time was that if you recall?

A It must have been in July or August.

Q Of 1908?

A I have not attempted to refresh my mind particularly about this, and I have not had any more than a few minutes conversation with regard to it recently, and this was all four or five years ago, and I have had no connection with this company since January or the first of February, 1909. I am remembering to the best of my ability.

53 Q Did or did not the John Davis Company furnish material during the fall of 1908 for this contract?

testimony of
John D.
Hibbard.

Mr Peffers: Just a minute. That is asking for the conclusion of the witness.

The Court: Objection overruled.

Mr Peffers: Exception.

To which ruling of the court the defendant Illinois Surety Company then and there duly excepted. And the court thereupon allowed said Surety Company an exception to said ruling.

A May I ask for the question?

The Court: You are president of the company?

A Yes sir.

Mr Hopkins: He was not connected with the company at that time?

A Yes sir, in the fall of 1908 I was.

Mr Hopkins: I beg your pardon.

A My recollection of it, the company did furnish material during the fall of 1908, but my connection with the company officially ceased on the first of February, 1909.

Mr McKenzie: Q To whom was that material furnished?

A W. H. Schott, so far as I know there was never any other account.

Mr Hopkins: Wait a moment; don't volunteer anything.

Mr McKenzie: Q Do you recall whether or not that was under a written contract?

A I don't imagine it was. If there was any written contract, I don't recall it. It was not usual or customary
54 to make a written contract with a man for material.

Q So far as you recall then, it was upon—

A Written orders, ordinary form of written order.

Q Upon the basis of your conversation with him earlier?

Mr Hopkins: I object to that, as a conclusion.

The Court: Objection overruled.

Mr Hopkins: Exception.

To which ruling of the court the defendant Illinois Surety Company by their counsel then and there duly excepted, and the Court thereupon allowed said Surety Company an exception to said ruling.

A In that instance as in all others, there was undoubtedly a creditors arrangement, and under the circumstances that credit would be made by me, as I was president of the company.

Mr McKenzie: Q Did you as president of the John Davis Company ever have any arrangement or agreement with W. H. Schott or anybody else whereby this account for this

material furnished Schott for the Naval Training Station should be paid in anything else but cash? Testimony of
John D.
Hibbard.

Mr Hopkins: That is objected to.

The Court: Objected overruled.

Mr Hopkins: Exception.

To which ruling of the court the defendant Illinois Surety Company by their counsel then and there duly excepted, and the court thereupon allowed said Surety Company an exception to said ruling.

A I will ask you to explain your question a little bit more.

What else would we have taken if we had gotten it?

55 Mr McKenzie: Q At that time the John Davis company had an old account against Schott, did it not?

A Yes sir.

Q Under certain conditions that account was to be paid for in stock?

A There was a proposal to that effect, yes.

Q Did that plan in any way affect the account for material furnished for the Naval station?

A No, it was after the account already accrued and past due, and that was contingent upon certain—

Q Will you state what the arrangement was between Mr. Schott and this Creditor's Committee, which you have described, with reference to the account existing prior to July 1st, 1908?

Mr Peffers: That has nothing to do with this lawsuit, and I object to it.

The Court: I dont know that it has, unless it is preliminary.

Mr Peffers: It has nothing to do with it.

Mr McKenzie: I just bring this up for the reason Mr Hibbard is compelled to leave town tonight and I want to give them ample opportunity to go into this question if they care to with Mr. Hibbard. If they object to asking this question, all right.

Mr Peffers: Of course, I object to that,—that has nothing to do with this matter, as I understand it.

56 Mr. McKenzie: Well, it is all past.

Mr. Peffers: That's all right.

Mr. McKenzie: Q While you were with the company were any orders for materials received from the Schott Engineering Company?

A I can't recall about that.

Testimony of
John D.
Hibbard.

Q When was the Schott Engineering Company organized?

A I can't say definitely, although I think it was about the first of 1909,—it must have been.

Q You left the John Davis Company on the 1st of February?

A It was some time between the time I severed my connection and the time this contract was taken, must have been between August 1908, and February, 1909, I don't recollect the date.

Q As a matter of fact it was organized on the 2nd of January, 1909, and you left there the first of February, 1909?

A Yes, it is apparent I was going to leave before that, the arrangements were completed on the 22nd day of January, 1909, with Judge Gary, but nominally it was the 1st of February.

Mr. McKenzie: That is all. You may cross-examine.

57

Cross-Examination by Mr. Peffers.

Q How long were you the president of the John Davis Company?

A How long have I been?

Q Yes, prior to February 1?

A I had been Vice President and General Manager beginning about 1889, and upon Mr. Davis' death, I think it was in—

Q 1903, was it?

A 1900, I think Mr. Davis died, and I became president—it was before we moved down to 22nd Street.

Q And you continued as president from 1900 to February 1, 1909?

A Yes, sir.

Q Now, you say you had been selling material to Schott for a number of years prior to 1908?

A Yes, sir.

Q You were a member of the creditors' committee that were handling Schott's affairs?

A Yes, or endeavoring to.

Q What was the purpose of that committee—in a general way?

A Schott got into difficulty prior to August 1908—well, just how far back I can't say.

Q That was about the middle of 1907, wasn't it?

A It may have been; I wouldn't say without refreshing my mind on that.

58 Q And there were three members of the committee?

A There were about a dozen large creditors—

Q What I am getting at is this, Mr. Hibbard; you had five members of that committee?

A If you want me to tell you, I will tell you to the best of my ability.

Q Well, I want you to answer my question and we will get along quicker. You had five members of that committee?

A Yes sir.

Q Yourself and Mr. A. J. Goodhue?

A Yes sir, Mr. Goodhue, Vice President of the United States Cast Iron Pipe Foundry Company, and Mr. H. E. Adams, General Agent of the American Radiator Company, and W. A. Brown and John T. Shay.

Q And you represented the John Davis Company?

A I did; that is all the interest I had in Schott or the creditors' committee or this contract or anything else, as a creditor of W. H. Schott.

Q You had no personal interest in Schott?

A I had no personal interest in Schott or the Schott Engineering Company.

Q You were there representing the John Davis Company?

A The John Davis Company indebtedness.

Q When you went on there as a director, you were representing the John Davis Company?

A Purely as a dummy director, and if you want a history of that transaction, I will give it to you.

59 Q Just a minute. I want to ask you, you were on there as a representative of the John Davis Company and not personally?

A Naturally.

Q And you represented the John Davis Company?

A Yes, sir, and their interests.

Q Sir?

A I had no personal interest whatever.

Q You did represent the John Davis Company?

A I did represent the Davis Company.

Q Were there any other members of the creditors' committee in the Schott Engineering Company—Goodhue was a director, wasn't he?

Testimony of
John D.
Hibbard.

A Yes, a similar director; it was all merely to enable Schott to organize his company, which was supposed to be put in such shape that additional capital could be gotten in.—

Q Yes.

A (Continuing) and then these various directors, representing their indebtedness were to resign in favor of the people who might be found to invest in this company.

Q You acted as a director, did you, not, for some time in the Schott Engineering Company?

A I think so, yes.

Q Now, in January—

A How long I cant remember.

Q Just a minute—On January 2nd 1909, you were President of the John Davis Company?

A I was.

Q But you didnt leave that office until February 1, 1909?

A That is correct.

Q Now, you say you shipped a lot of material to 60 to Schott?

A I didnt say—I didnt say “a lot”—I havent looked at the books

Q Well, I wont say a lot—you shipped him some material?

A I think there was some shipped from the time he signed that contract up to the first of February, I think very likely there was, but I had not seen the ledger since I went out of the place.

Q Your best recollection—as a matter of fact between the time that Schott went on with the work up at the Naval Station to the first of January, you shipped some material up there?

A That is my impression yes.

Q Is it not a fact, that between January 1, 1909, and February, during your incumbency as President, you also shipped material up there?

A I shouldnt be surprised there were some items on the ledger, but I havent seen it and of course I cant remember about that.

Q You dont remember about that?

A No, sir.

Q Did you have any connection with the execution of the contract between Schott and the government—did he advise with you respecting that?

A I think his figures as to what he expected to make on the completion of that contract was submitted to this creditors' committee.

Q And you and the other men of the committee went over with Schott in a general way to see how he was going to come out?

A Yes, we endeavored to examine the figures.

Q Did you call with Schott on the Surety Company for the bond?

A My recollection is there was a letter written to the Surety Company.

Q You remember you had some conversation with Mr. Blount, who was then president of the Surety Company, concerning this bond?

A I dont think I had any conversation with Mr. Blount.

Q And then Mr. Blount sent you a letter, didnt he, and didnt your committee reply to it, and state that you would like to have the Surety Company sign the bond?

A I wouldnt say positively, because, as I say, this was a good many years back, but I am rather under the impression there was such a letter, and if there was such a letter, the letter will show.

Q You were interested in working Schott out the best you could?

A Naturally, we had several thousand dollars of a past due account.

Q Of a prior indebtedness?

A Of a prior indebtedness, and that was all the interest any of the creditors ever had, we never received any money for our services, or never received anything out of it, and if we succeeded we got nothing.

Q Your idea was when you took over this contract was to try to work out what profit there was in it, both to help the creditors and Schott?

A Yes, sir.

Q Now, Mr. Hibbard, you were present at the meeting where you not, on January 2nd of the creditors of the Schott Engineering Company?

A Have you the record there?

Q Yes.

A Does it show me as being present?

Q Yes.

A Then I was.

Testimony of
John D.
Hibbard.

Q That is your signature there, is it, on page 71? (Indicating)

A Yes, sir.

Q That is your signature, is it?

A Yes, sir.

Q You remember as a fact you were there?

A I do now.

Q You do now?

A But I could not have told you without looking at it, no, sir, I cant remember four or five years back.

Q You remember there was a meeting?

A I remember there was some meetings, of course.

Q You remember of the meeting of January 2, 1909, that is where you passed this resolution and transferred this contract to the Schott Engineering Company?

A If the record shows that, that also would be correct.

Mr. McKinzie: The record is the best evidence on that.

A I dont remember, I cant say what took place at any particular meeting four or five years ago.

63 Mr. Peffers: You do remember you were present at that meeting?

A I do now, yes, at least I will say I was.

Mr. Peffers: That is all.

Mr. McKinzie: That is all.

Thereupon court adjourned until two o'clock the same day.
May 20, 1913.

Testimony of
W. H. Schott.

64 W. H. SCHOTT, a witness called on behalf of the plaintiffs, having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Q Mr. Schott, will you state your name and residence?

A W. H. Schott. I moved today to the Del Prado Hotel. I had been living at the Stratford Hotel for some time.

Q That is in Chicago?

A Yes, sir.

Q You are the Mr. Schott, who executed the contract and bond involved in this suit covering the Naval Training Station?

A I am.

Q Was any suit ever brought against you by the Federal Government upon this bond?

Mr. Peffers: Wait a minute. I object to that.

The Court: Overruled. He wants to show that there was no suit brought.

65 Mr. Hopkins: That there was no suit brought.

The Court: That is proper, I suppose.

Mr. Hopkins: No suit brought.

Mr. McKenzie: No suit brought.

Mr. Hopkins: Yes, I got the point.

A Not to my knowledge.

The Court: And there was none brought?

A Not to my knowledge.

Mr. McKenzie: Q Did you or the Schott Engineering Company complete this Naval Training Station contract?

A The Schott Engineering Company completed it under the receivership finally.

Q You mean by that the Central Trust Company finally completed the work?

A Yes, sir.

Mr. Peffers: Well, as Trustee.

Mr. McKenzie: You mean as Trustee?

A Yes, sir.

Mr. Peffers: As Trustee for whom?

Mr. McKenzie: As Trustee for the Schott Engineering Company?

A Yes, sir.

Q Did you personally make the final adjustments of this contract with the government?

A No, sir.

Q Do you know in whose charge that was?

A Central Trust Company.

Mr. Hopkins: Central Trust Company, as Trustee for 66 this Schott Engineering Company, wasn't it?

A Yes, sir.

The Court: They were the Trustees. Were they the Trustees for anybody else?

A I don't know. They were Trustees for me at the same time.

Mr. Hopkins: I don't know. They were Trustees for a good many companies.

The Court: He says they were Trustees for him at the same time.

testimony of
W. H. Schott.

Mr. McKenzie: The Central Trust Company was Trustee for you at the same time?

A Yes, sir.

Q You purchased certain material from the John Davis Company, did you not?

A I did.

Q With whom were the arrangements made for that purchase?

A Mr. Hibbard was the President of the John Davis Company at that time.

Q What did you purchase from him?

A Pipe, belts, fittings, and so forth.

Q What was your original arrangement with him—was it in writing or was it oral?

A Oh, I think they have a written order on that, I don't remember the details, but there must have been a written requisition on it.

Q Are those written requisitions—was all of this material arranged for at the beginning of the contract, or from 67 time to time?

A Well, it depends on the character of the item. You take such things that would take time for delivery, they were arranged for after we had acquired the contract.

Q I didn't quite hear that.

A I say, take those items that would take a long time for delivery, and where the quantities were known, why, they were arranged for shortly after the contract was made, a schedule made up for deliveries, but in the carrying through of the work there would be lots of items that would not be needed for a considerable length of time after the work started, and some of those items probably were held back until a reasonable length of time before they would be needed.

Q Did you have any general agreement with reference to this material, either in writing or orally with Mr. Hibbard?

A My recollection is that with the John Davis Company we had a written agreement as to the price of the material. That is memory only, and I am taking that position for the reason that matters of that kind, we generally fix them that way, and I am assuming that the same general plan was carried through on that, but my—

Mr. Hopkins: The Court understands this all goes in subject to the objections that we have made.

The Court: All right. Overruled.

8 Mr. McKenzie: Q Have you any such written agreement in your possession now? Testimony of
W. H. Schott

A No, sir.

Q You don't know whether it exists or not?

A Well, I couldn't say as to that, because at the time that the Central Trust Company was appointed Trustee for me, I turned everything over to them, but that would be a part of the Schott Engineering Company record, if there was any.

Q And did this agreement pertain to all of the material which the John Davis Company was to furnish for that job?

A I don't remember as to whether the original order carried the expansion joints. My off-hand thought is that it only covered the pipe, that the expansion joint order was a subsequent order, because on that particular department we had to get up a drawing and submit it to the government for approval prior to the time that we could place the order.

Q Did you have any arrangement earlier as to the price?

A Couldn't say on that, because it was a special design.

Q Have you any idea as to what time that order was given?

A No, I don't. I know there was about a four months hold-up in the government's approving of the plans, but from memory I would say that it was along early in 1908 before we got the approval of the government on the plans, and the order was placed after that time.

Mr. Hopkins: In what year?

A 1908—wait a minute, 1909.

Mr. McKenzie: The book which I am handing you is the minute book of the Schott Engineering Company, is it not?

A Yes, sir.

Q You were the President of that Company?

A Yes, sir.

Q Will you state when the organization meeting of the Schott Engineering Company was held?

A I will have to look it up. My recollection is it was January second, 1909. I will have to look that up for the exact dates.

Mr. Peffers: It was the last day of the year 1908 when you organized, very last day of the year.

Mr. McKenzie: It shows January second.

A The twenty-ninth day of December, 1908, was the date of organization.

Testimony of
W. H. Schott.

Q That is the date of the stockholders' meeting?

A Yes, sir.

Q Prior to that time you were doing business individually,
Mr. Schott?

A Yes sir.

Q During that time you had this contract with the Gov-
ernment?

A Yes sir.

70 Q Who were the stockholders in the company at the
date of its organization?

A Clarence E. Eaton, T. L. Croton, B. M. Maxwell, Albert
F. Jones, Clarence D. Trott, J. P. O'Donnell, L. H. Palmer, all
of Portland, Maine.

Q All of Portland, Maine?

A Yes, sir.

Q How much stock did they hold?

Mr Peffers: This, of course, the court understands is ob-
jected to.

The Court: What?

Mr Peffers: It is, of course, understood that we object
to this. I don't want to object to every question on this
line.

The Court: I understand. This is all going in subject to
objection.

Mr Hopkins: It is done for the purpose of expediting the
matter, and any point we want to raise, if we want to raise
any at all, we have the privilege of doing so.

The Court: You have a right to. The record will show
your objection.

A Total fifteen shares.

Mr Wyeth: The objection I suppose is not on the ground
of secondary evidence?

The Court: No.

Mr Peffers: We are not going to object on any point like
that.

71 The Court: No, same objection as subsequently was
made to the others.

Mr McKenzie: Q What did you say?

A Fifteen shares.

Q Which one of them held fifteen shares?

A No, one man had nine and the rest of them had one,
total fifteen shares.

Q Which was the one that had nine?

A Mr Eaton.

Q Who was Mr Eaton?

A I couldnt tell you.

Q You dont know any of those gentlemen?

A No, sir.

Q Those were just the formal organizers of the corporation?

A Yes, sir.

The Court: What is the total amount of the stock, Mr Scott?

A That was authorized?

Q Yes.

A Five thousand shares of common and five thousand shares preferred.

Q How much subscribed?

A Only fifteen shares.

Q Only fifteen shares subscribed?

A Yes, sir.

Mr McKenzie: Q Were there any other stockholders' meetings of the company held.

A I dont remember of any additional stockholders' meetings outside of the incorporating of stockholders. The record here will show. (Witness peruses record.) There were not other stockholders' meetings.

Q When was the first directors' meeting of the company held?

A The first meeting of the directors was held on January 2, 1909.

Q Where was that held?

A At 1108 American Trust Building, Chicago.

Q That is your office?

A Yes sir.

Q What directors were present at that meeting?

A In addition to myself Mr A. J. Goodhue, John T. Shay, John D. Hibbard, W. A. Brown, M. O. Payne and Charles R. Scott.

Q How much stock did those directors hold?

A My recollection is that they had a share each outside of myself.

Q Were those shares paid for?

Mr Hopkins: That is objected to. That dont make any difference.

The Court: Overruled.

Mr Hopkins: Exception.

To which ruling of the court the defendant by its coun-

testimony of
W. H. Schott.

sel then and there duly excepted; and the Court thereupon allowed the defendant Illionis Surety Company an exception to said ruling.

A I think they were transferred from the original incorporators.

The Court: Qualification shares, Mr Schott?

A Sir?

Q Qualification shares?
money into the company?

A Yes sir.

Mr McKenzie: Q None of those directors then paid any

A Not to my knowledge.

73 Q Who were elected officers at that meeting?

A I was elected president, and Mr Payne, Vice-President, and Mr Scott, secretary, and Mr Scott, treasurer.

Q And then aside from yourself none of the officers had any financial interest in the company?

A No sir.

Q Were there any other directors' meetings?

A There was a directors' meeting on March 2, 1909.

Q Was any business transacted at that meeting?

A The only thing that was done was the acceptance of the resignation of the secretary and a new secretary elected.

Q Who was the new secretary?

A Mr. Casson

Q Did he have any financial interest in the company?

A Well, he made an arrangement to undertake to do certain things.

Q Was he a stockholder at that time aside from qualifying shares?

A That is all.

Q I understood you to say that all of the other directors except yourself had no financial interest except qualifying shares?

A. That is my recollection of it.

Q Were there any other directors' meetings at which any business was transacted?

A I think that was the last directors' meeting we had. At the rest of them we failed to have a quorum.

74 Q They were adjourned meetings?

A They are adjourned meetings, or regular meetings called for by the by-laws, and we didnt get enough out for a quorum.

The Court: How much stock did you have?

A I had pretty near all of it. I have forgotten. I will have to look up and see. I had so much of it didnt know what to do with it. A I had \$75,000 first preferred, \$100,000 of second preferred and \$500,000 common.

Mr McKenzie: Q Will you turn to that list of directors and officers. Mr Payne whom you mentioned there was in your employ before, was he not?

A Yes sir.

Q Mr Scott was your bookkeeper?

A Yes sir.

Q Had been before?

A Yes sir.

Q Mr Hibbard and Mr Goodhue were members of the creditors committee?

A Yes sir.

Q And they had been on the creditors committee in connection with your business for sometime before, some months before that?

A It was formulated as I remember it about May or June, 1907.

Q I think I havent mentioned them all

A Mr Brown.

Q Mr Brown. What was his connection with the company?

A He was a director, subsequently.

Q Had he been in your employ before?

A No, Mr Brown had been on the creditors committee.

75 Q He was a member of the creditors committee?

A Yes, sir.

Q That constitutes all the officers and directors?

A Yes, sir. Mr Shay the same.

Q Mr Shay was a member of the creditors committee?

A Yes sir.

Q You were president of the company and continued to manage the business after the corporation was organized?

A I managed the business in conjunction with the board of directors. We always acted as a committee at our meetings from time to time. I never carried on anything or done anything without their consent.

Q You had no formal meetings, however?

A No sir.

Q You say "without their consent"; you are referring to this creditors committee, these directors, are you not?

A Yes, sir. They were on the directory there, and on

testimony of
V. H. Schott.

account of our not having carried out some things that had been agreed upon while they were directors in the company, they still continued to act in the capacity of a creditors committee.

Q Just as they had before?

A Yes sir.

Q How much stock did you hold in the company Mr Schott?

The Court: He already stated that, didn't he?

Mr McKenzie: In answer to your question?

76 The Court: Yes.

Mr McKenzie: I didn't hear it.

The Witness: The record here shows that the consideration was five hundred thousand of common, a hundred thousand of the second preferred, and seventy-five thousand of the first preferred, but I have forgotten as to the amount of deliveries that were made. The stock book would have to answer that for you.

Mr McKenzie: I have it right here.

The Court: The stockholders' books will show that.

A I haven't seen these books for about three years, and my memory is a little bit off.

(Mr McKenzie hands the witness stock book).

Mr McKenzie: Q You have now the stock register?

A Yes sir.

Q You may turn to the index and mention to us the names of those stockholders, stockholders in your company?

A American Trust & Savings Bank as Trustee, William J. Andrew—

Mr Peffers: How much—how many shares?

Mr McKenzie: How much stock?

Mr Peffers: The American Trust & Savings Bank.

A They had 3,500 shares as trustee.

Mr Peffers: Trustee for whom, 3,500 shares?

A For me.

77 Mr McKenzie: Q That was stock which had been given to you in consideration of turning over the business?

A That was part of it.

Q Part of the stock turned over to you, and they held that as trustee?

A That was deposited in my trust for voting purposes on account of control.

Q The next stockholder?

A William J. Andrews, Clinton, Iowa.

The Court: How much?

A He had 56 shares.

Mr McKenzie: Q Of what class of stock?

A Preferred.

Q Did the preferred stock have voting powers, do you know?

A My recollection is—

Mr Hopkins: The record will show that, the record will show that.

A —it did, but I would not be positive about that.

Mr Peffers: The record will show that.

Mr McKenzie: We will show the record. At what date he acquire this stock?

A On August 23, 1909.

Q The next stockholder?

A W. A. Brown. He had one share of the common.

Q That was a qualifying share?

A Yes, sir.

Q The next stockholder?

A George Wybonas. He had 75 shares of the preferred.

Q When was that stock acquired?

A February 4, 1909.

78 Q What was that man's name?

A Bonas.

Q Where does he live?

A Chicago.

Mr Hopkins: What did he say?

Mr Peffers: He had 75 shares.

Mr McKenzie: Q Was that sold to him by the company or by you?

A That was sold by the company. Mr Cassan made that sale.

Q The next stockholder?

A A. J. Goodhue.

Mr Peffers: How much, one share?

Mr McKenzie: The record will show.

A He had ten shares—no, one share.

Q The next stockholder?

A John D. Hibbard, he had one share.

Q I thought you were going ahead, pardon me.

A Oh, Robert H. McMurdy, he had ten shares preferred.

Q When was that?

A That was bought April 4, 1909.

Q April 4th?

testimony of
W. H. Schott

A I mean February 4, 1909. Robert R. McCormick had ten shares, purchased on June 14th.

Mr Hopkins: Purchased at what time?

A June 14, 1909.

Mr Peffers: Was that preferred, Mr Schott?

A Yes sir. National Light Heat & Power Company.

Mr Peffers: What name is that?

A National Light Heat & Power Company, on January 29, 1909, bought 133 shares preferred.

79 Mr McKenzie: Q Was that a purchase of stock?

A Yes sir.

Q Where are they?

A New, York?

Mr Hopkins: What is the date?

Mr Peffers: What is that date, Mr Schott?

A Sir.

Q What was the date please?

A January 29th, 1909. M. O. Payne, one share of stock, common, which was transferred to him on April 6, 1909; F. W. Powers, had ten shares, preferred, which was purchased on March 1, 1909. Robert H. Porter, ten shares preferred, on March 4, 1909; Charles S. Stone, on February 20th, had nine shares that was given in settlement of an account.

Mr McKenzie: Q Common or preferred?

A That was first preferred. R. K. Warren, on July 31st, fifty shares preferred and fifty shares of common. That seems to be about the list.

The Court: Except your own.

A Except my own. There was issued to me a total of—I have to add them up—4,973 shares were actually issued to me of which 40 shares were—45 shares were first preferred and 40 shares preferred and the balance of them common, and of that, 3500 shares was deposited with the American Trust.

Mr McKenzie: Q What was that amount of common?

80 Mr Peffers: The balance of it was common.

A 4,876 shares total of common.

Q How many shares, Mr Schott, do you say were deposited in the American Trust?

A 3,500.

Q 3,500?

A 3,500 shares of common.

Mr McKenzie: Q On January 2nd according to that directors' meeting your property and personal business was turned over to the corporation?

A Yes sir, by contract.

Q And in consideration of that property and business this stock was issued to you?

A Yes sir.

Q Did the corporation have any other assets at that time aside from your property and business?

A That is all.

Q Among the assets transferred was the Naval Training Station contract?

A Yes sir.

Mr Peffers: Wait a minute. That document speaks for itself, if the court please.

The Court: If it is in writing, yes.

Mr Peffers: It is in writing in the record book.

Mr McKenzie: I offer in evidence the minutes of the first meeting of the signers of the articles of agreement of the Schott Engineering Company as appearing on pages 13 to 23. I will withdraw that offer. I think it will be too long and be superfluous. I offer in evidence pages 79 to 86 of the minute book of the Schott Engineering Company, being a part of the record of the first meeting of stockholders.

81 The part offered is as follows—

Mr Hopkins: You only offer a part of the meeting.

Mr McKenzie: The first part is formal, and which I dont think you want. I wish to offer the rest of it.

Mr Hopkins: Well, let's see just the part you dont want to offer.

Mr McKenzie: It is part of that. It involves the character of this and a lot of waivers of notice.

Mr Hopkins: We will examine it afterwards.

Mr McKenzie: What is the use of encumbering the record with all that stuff. (Reading) "Thereupon a communication was received"—

Mr Hopkins: What is that meeting?

Mr McKenzie: I read from W. H. Schott, in words and figures as follows:—January 2nd.

Mr Hopkins: Hadnt you better read enough to show the organization of the board?

Mr McKenzie: Well, I have got that in evidence.

The Witness: That is that January 2nd directors' meeting.

(Whereupon said minutes of the Schott Engineering Com-

pany were read in evidence, and are in the words and figures following, to-wit) :

Minutes of
meeting of
directors of
The Schott
Engineering
Co., Jan. 2,
1909.

82 THE SCHOTT ENGINEERING COMPANY

Record of Meeting of Directors Held at Room 1108 American Trust Building, Chicago, Illinois, January 2nd, 1909.

A meeting of the Directors of The Schott Engineering Company, was held at Room 1108 American Trust Building, in the City of Chicago, Illinois on the 2nd day of January, A. D. 1909 at two o'clock in the afternoon.

There were present
W. H. Schott,
A. J. Goodhue,
John T. Shay,
John D. Hibbard,
W. A. Brown,
M. O. Payne,
and

Charles R. Scott,
being all of the Directors of the corporation.

Mr. A. J. Goodhue was chosen Chairman of the meeting and duly called the meeting to order.

Mr. Chas. R. Scott was chosen Secretary and acted as Secretary of the Meeting.

The Board of Directors thereupon proceeded to the election of permanent officers for the corporation, and the following gentlemen were unanimously elected, by ballot, to the offices set before their names, respectively :

President,	W. H. Schott,
Vice-President,	M. O. Payne,
Secretary,	Chas. R. Scott,
Treasurer,	Chas. R. Scott.

83 The President thereupon took the chair, and the Secretary kept a record of the meeting.
Upon motion duly made and seconded, the minutes of the

Minutes of
meeting of
directors of
The Schott
Engineering
Co., Jan. 2,
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meeting of the previous Board of Directors of this corporation were read and approved.

The Secretary presented and read a waiver of notice of this meeting, signed by all the Directors.

It was ordered that the Secretary take the oath of office and subscribe the written oath presented at this meeting.

The Secretary thereupon took and subscribed the oath.

It was ordered that the Treasurer give a bond in the sum of Ten Thousand Dollars, and submit said bond to the Board for approval as to the sufficiency of the surety. The Treasurer thereupon presented his bond, signed by himself as principal, and by W. H. Schott as Surety and the same was approved.

Said Waiver of notice and Secretary's oath and Treasurer's bond are as follows:

Waiver of Notice.

First Meeting of the Board of Directors.

We, the undersigned, being the directors elected by the stockholders of the above named corporation do hereby waive notice of the time, place and purpose of the first meeting of the Board of Directors of said corporation.

We designate the 2nd day of January, 1909 at two o'clock in the afternoon as the time, and Room 1108 American Trust Building, in the City of Chicago, Illinois, as the place of said meeting; the purpose of said meeting being to elect officers, authorize the issue of the capital stock, authorize the purchase of property if necessary for the business of the corporation, and the transaction of such other business as may be necessary or advisable to facilitate and complete the organization of said corporation and to enable it to carry on its contemplated business.

Dated the 2nd day of January, A. D. 1909.

W. H. SCHOTT

JOHN D. HIBBARD

M. O. PAYNE

A. J. GOODHUE

CHAS. R. SCOTT

JOHN T. SHAY.

W. A. BROWN

85 Upon motion duly seconded and carried the following

Minutes of
meeting of
directors of
The Schott
Engineering
Co., Jan. 2,
1909.

forms of stock certificates were presented and adopted as the form of stock certificates of this Company:

First Issued Preferred.

Incorporated Under the Laws of Maine

The Schott Engineering Company

Capital Stock, \$1,000,000

Shares \$100 each.

This Certifies That is the owner of shares of the First Issued Preferred Capital Stock of The Schott Engineering Company, full paid and non-assessable, transferable only on the books of the Company in person or by attorney, upon the surrender of this Certificate.

The entire issue of the First Issued Preferred Capital Stock is Seventy-five Thousand Dollars (\$75,000.00).

The owners of this stock are entitled to receive and the Company is bound to pay out of any and all net earnings whenever ascertained, cumulative dividends thereon at the rate of and never exceeding Six Per Cent (6%) Per annum, payable quarterly, on dates to be fixed by the Board of Directors before any dividends shall be set apart or paid on the Common Stock, and before any dividends shall be set apart or paid on the Common Stock, there shall be set aside out of the net earnings sufficient money to pay the dividends on this stock at least one year in advance. After the dividends and all accumulations of dividends on this stock shall have been paid, and sufficient money out of the net earnings set aside to pay the dividends one year in advance, a sufficient amount of the net earnings shall be set aside for the purpose, within five years from the date of issuance to retire this stock on the basis of par and accrued dividends.

86 The provision for the retirement of this stock shall be compulsory upon the Company but may be waived by the owner by a waiver in writing, and, if so waived, this stock shall be subject to redemption at any time at One Hundred and Fifteen Dollars (\$115.00) per share.

In Witness Whereof, the duly authorized officers of this Company have hereunto subscribed their names and caused

The corporate seal to be hereto affixed, this day of
, A. D. 190 .

Minutes of
 meeting of
 directors of
 The Schott
 Engineering
 Co., Jan. 2,
 1909.

.....
President.

.....
Treasurer.

Preferred Stock

Incorporated Under the Laws of Maine
 The Schott Engineering Company
 Capital Stock, \$1,000,000
 Shares \$100 each.

This Certifies That is the owner
 of shares of the Preferred Capital stock of The
 Schott Engineering Company, full paid and non-assessable,
 transferable only on the books of the Company in person or
 by attorney, upon surrender of this Certificate.

The entire issue of the Preferred Capital Stock is Four
 Hundred and Twenty-five Thousand Dollars (\$425,000).

The owners of this stock are entitled to receive and the
 Company is bound to pay out of any and all net earnings
 whenever ascertained, cumulative dividends thereon at the
 rate of and never exceeding Six Per Cent (6%) Per annum,
 payable quarterly on dates to be fixed by the Board of Direc-
 tors before any dividends shall be set apart or paid on the
 Common stock, and before any dividends shall be set apart
 or paid on the common stock there shall be set aside out of
 the net earnings sufficient money to pay the dividends on
 87 this stock at least one year in advance.

This stock shall be subject to redemption by the Com-
 pany at any time at One Hundred and Fifteen Dollars
 (\$115.00) per share.

This stock is subject to the conditions and provisions gov-
 erning an issue of First Issued Preferred Stock, amounting
 in all to Seventy-five Thousand Dollars (\$75,000.00).

In Witness Whereof, the duly authorized officers of this
 Company have hereunto subscribed their names and caused
 the corporate seal to be hereto affixed, this day of
, A. D. 190 .

.....
President.

.....
Treasurer.

Bill of Exceptions.

minutes of
meeting of
directors of
The Schott
Engineering
Co., Jan. 2,
1909.

Common Stock.

Incorporated Under the Laws of Maine.

The Schott Engineering Company.

Capital Stock, \$1,000,000.

Shares \$100 each.

This Certifies That _____ is the owner of _____ shares of the Common Capital Stock of The Schott Engineering Company, full paid and non-assessable, transferable only on the books of the Company in person or by attorney, upon surrender of this Certificate.

This stock is subject to the conditions and provisions governing an issue of First Issued Preferred Stock, amounting in all to Seventy-five Thousand Dollars (\$75,000), and a Preferred Stock issue, amounting in all to Four Hundred and Twenty-five Thousand Dollars (\$425,000).

This stock shall participate in dividends out of net earnings when ascertained, after, and subject to the payment of 88 of dividends on the First Issued Preferred and the Preferred Stock, as provided by the conditions and terms governing the issue of both of said Preferred Stock.

In Witness Whereof, the duly authorized officers of this Company have hereunto subscribed their names and caused the corporate seal to be hereto affixed, this _____ day of _____, A. D. 190 .

President.

Treasurer.

On motion duly seconded and carried, it was Resolved, that an office of this Company be established and maintained at Number 125 Monroe Street, in the City of Chicago.

Upon motion duly seconded and carried, it was Resolved that the Directors of this Company hold monthly meetings on the second Tuesday of each month at the office of the Company, 125 Monroe Street, Chicago, at the hour of two o'clock P. M.

Upon motion duly seconded and carried, it was Resolved that the fiscal year of this corporation shall run from January 1st to December 31st of each year.

Thereupon a communication was received and read from W. H. Schott, in words and figures as follows:

Chicago, January 2nd, 1909.

The Schott Engineering Company,
1108 American Trust Building,
Chicago.

Minutes of
meeting of
directors of
The Schott
Engineering
Co., Jan. 2,
1909.

Gentlemen:—

In consideration of your delivering to me, full paid and non-assessable, Seven Hundred Fifty (750) shares par value each \$100.00, of your First Issued Preferred Stock; One Thousand (1,000) shares, par value each \$100.00, of your Preferred Stock and Five Thousand (5,000) shares, par value \$100.00 each of your common stock, I propose to assign over to you, the exclusive right, title and ownership of what is known as "The Schott Systems of Central Station Heating," all right, title and ownership to the contract with the Sale Lake Public Service Company, Salt Lake City, Utah; the same with the Des Moines Heating Company, Des Moines, Iowa, the same with the United States Government on the work at Lake Bluff, North Chicago, Illinois and to further assign the equity in the following list of securities which are now being used as collateral by me on loans with certain individuals, firms and banks:

\$68,500.00 par value of First Mortgage bonds of the Citizens Mutual Heating Co., Terre Haute, Ind.
\$18,500.00 par value of Common stock, of the Citizens Mutual Heating Co., Terre Haute, Ind.
\$36,000.00 par value, of 5% Preferred Stock of the Mt. Carmel Gas & Electric Co., Mt. Carmel, Ill.
\$54,000.00 par value of Common Stock of the Mt. Carmel Gas & Electric Company, Mt. Carmel, Ill.
\$20,750.00 par value of 8% Preferred stock of The Schott Specialty Company, Chicago.
\$58,459.45 Bills Receivable.
\$60,926.03 Accounts Receivable.
\$11,800.03 Furniture & Fixtures, Pipe, Fittings, Tools and Implements, Stationery, Scales, etc.

It is further understood and agreed that in consideration of the above delivery, you are to assume a total liability in the way of accounts and Bills Payable on account of construc-

minutes of
meeting of
directors of
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tion on hand, etc. in the amount of not to exceed the sum of \$50,000.00.

It is further understood and agreed that the Common stock is to be delivered to me upon the acceptance of this proposition; that the First Preferred Stock is to be delivered to me upon my demand; that the Preferred Stock is to be delivered to me pro rata as I pay in to the Treasury of the Company through myself, successors or assigns, at the rate of seventy-five cents (75c) on the dollar.

I am also to assign to the Corporation my life insurance policy now with the North Western Life Insurance Co. in the sum of \$50,000.00 this to be transferred so as to be payable to the Company, it being understood that you are to pay all premiums and carry the same.

This proposition is made based upon its prompt acceptance and your taking over the business as of January 1st, 1909, and assuming all responsibility and relieving me of any liability, excepting the liability incident to the complete performance of the true intent of this proposition.

In reference to any of these contracts where the usual course of assignment might cause any discrepancies, as a matter of convenience to you, it is agreeable for the same to be carried through in my name but all bills are to be paid by you and all receipts are to be delivered to you, so as to give you the benefit, the same as though the accounts were in your name.

Respectfully submitted,

(Signed) W. H. SCHOTT.

Thereupon W. H. Schott withdrew as president of the meeting and M. O. Payne, the Vice President of the Company took his seat and became the President of the meeting.

Upon motion duly seconded and carried, the following preambles and resolutions were unanimously adopted:

Whereas, W. H. Schott has offered to sell to this corporation property as follows:

1. All right, title and ownership of what is known as "The Schott Systems of Central Station Heating";
2. All right, title and ownership to the contract with the Salt Lake Public Service Company, Salt Lake City, Utah.
3. All right, title and ownership to the contract with the Des Moines Heating Company, Des Moines, Iowa.
4. All right, title and ownership to the contract with the United States Government work being done at Lake Bluff, North Chicago, Illinois.
5. Also all equity in the following list of securities which

re now being used as collateral for loans, with certain individuals, firms and banks.

Minutes of
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- \$68,500.00 par value of First Mortgage bonds of the Citizens Mutual Heating Co. Terre Haute, Ind.
- \$18,500.00 par value of Common Stock of the Citizens Mutual Heating Co., Terre Haute, Ind.
- 1 \$36,000.00 par value, of 5% Preferred Stock of the Mt. Carmel Gas & Electric Co., Mt. Carmel, Ill.
- \$54,000.00 par value of Common Stock of the Mt. Carmel Gas & Electric Co. Mt. Carmel, Ill.
- \$20,750.00 par value of 8% Preferred Stock of the Schott Specialty Company, Chicago.
- \$58,650.00 par value of Common Stock of The Schott Specialty Company, Chicago.
- \$12,459.45 Bills Receivable.
- \$60,926.03 Accounts Receivable.
- \$11,800.03 Furniture & Fixtures, Pipe, Fitting, Tools and Implements, Stationery, Scales, etc.

6. Also the Life Insurance Policy on the life of W. H. Schott, issued by the North Western Life Insurance Company a the sum of \$50,000.00—said policy to be transferred so as to be payable to the Company,—the Company to pay all premiums and carry the same.

It being further understood and agreed that in consideration of the above delivery this corporation is to assume a total liability in the way of accounts and bills payable on account of construction on hand, etc., in the amount of not to exceed the sum of \$50,000.

And in addition upon the payment of money on the basis of seventy-five cents (75c) to the dollar on the shares of Preferred stock to be delivered, this Company is to deliver and hand over to the said W. H. Schott, his heirs, administrators, executors or assigns, seven hundred and fifty (750) shares of the Par value of One Hundred Dollars each, of the First Issued Preferred stock; One Thousand (1,000) shares par value One Hundred Dollars (\$100.00) a share, of the Preferred stock and Five Thousand shares par value One Hundred Dollars (\$100.00) each, of the common stock fully paid and non-assessable, the said Common stock to be delivered upon the acceptance of the proposition of the said W. H. Schott, the said First Issued Preferred stock to be delivered on the demand of the said W. H. Schott, his heirs, executors, administrators or assigns, and the said preferred stock to be

minutes of
meeting of
directors of
The Schott
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delivered to the said W. H. Schott, his heirs, administrators, executors or assigns, pro rata as he pays into the Treasury of this corporation seventy-five cents (75c) to the dollar in cash on the basis of par for the said preferred stock.

Whereas, it further appears upon due investigation and consideration that the property offered by the said W. H. Schott to this corporation is necessary and valuable and that it is to the best interests of this corporation, and the stockholders therein to accept the said proposition and that the said property and assets offered are a fair, full and adequate consideration for the said stock, and fully worth the par value thereof, and that the fair value of the said assets offered by the said W. H. Schott is Six Hundred and Seventy-five Thousand Dollars;

Now, Therefore, Be It Resolved, that this corporation accept the offer of the said W. H. Schott, to sell, assign and transfer to this corporation the property and assets hereinbefore described, and that this corporation, through its proper officers, issue to the said W. H. Schott, his heirs, executors, administrators or assigns, the said capital stock of this corporation in the manner and form as heretofore set forth and in the amount prescribed, fully paid and non-assessable.

93 Mr Hopkins: Read the board of directors that accepted the contract with Mr Schott.

Mr McKenzie: That is already in the record.

Mr Peffers: You called that a meeting of the stockholders.

Mr Hopkins: Just read it, I didnt hear it. I didnt hear it.

Mr McKenzie: It is a meeting of the directors.

Mr Hopkins: I didnt hear it. I want to see what the record shows on that, who was present.

The Witness: The last page there.

Mr McKenzie: At that meeting were present as is shown by these minutes, on page 69, W. H. Schott, A. J. Goodhue, John T. Shay, John D. Hibbard, W. A. Brown, M. O. Payne, and Charles R. Scott.

Mr Hopkins: Q Does that constitute a full board of directors?

A Yes sir, that was a full board.

Mr McKenzie: Q And none of that board except yourself had any financial interest in the company?

Mr Peffers: Wait a minute, I object to that.

The Court: Overruled. I think that already appears.

Mr McKenzie: You may answer.

A What is the question?

Q No one but yourself had any financial interest of these directors in the company? Testimony of
W. H. Schott

94 The Court: Preferred.

A They simply had the stock they held through the transfer.

Mr McKenzie: Q That is the qualifying shares?

A Yes, sir.

Mr Hopkins: Is that all?

Mr McKenzie: Just a minute.

Q In whose name were the transactions with the Federal Government with reference to this Naval Training Station contract after January 2, 1909?

Mr Hopkins: That is objected to.

Mr Peffers: That is objected to.

Mr Hopkins: As wholly immaterial.

The Court: Does it not already appear that the Government did not accept—did not agree to the assignment.

Mr McKenzie: I dont think that appears.

Mr Peffers: Why that, your Honor, is absolutely immaterial, as to anybody except between the Government itself.

The Court: I think that is true. I dont think it makes a bit of difference.

Mr Hopkins: Not a particle.

The Court: What position the Government takes in the matter, I dont see as it does.

Mr McKenzie: You dont think we are entitled to have in the record that this transaction continued so far as the
95 Government is concerned, in the name of Schott?

Mr Hopkins: Absolutely immaterial.

The Court: It already appears. It appears that Mr Abbott settled with the Government, and that the contract was made by Mr Schott. I think it sufficiently appears.

Mr McKenzie: Q The assets mentioned in this resolution, which I have just read, did those assets constitute your entire business?

A Yes, sir.

Q And after that time you gave your entire attention to the appointing of a receiver to the business of the corporation?

Mr Hopkins: I object to that.

The Court: Overruled.

Mr Hopkins: Exception.

To which ruling of the court, the defendant by its counsel, then and there duly excepted.

testimony of
W. H. Schott.

A What is the question?

Mr McKenzie: Q After the organization of the corporation, until it went into the hands of a receiver, you gave it your entire business attention?

A Yes sir, as president of the company.

Mr Wyeth: Q I suppose, Mr Schott, this contract referred to in these minutes that have been read had by you with Government at Lake Bluff is the contract in question in this case, referred to in the bond in this case?

96 A Yes.

Q For Lake Bluff, and also a station called North Chicago?

A North Chicago is the station on the—

Q Railroad station?

A On the steam road there.

Q You always called it North Chicago.

Cross-Examination by Mr. Hopkins.

Q Mr Schott, I want you to look at that letter. You received that from the John Davis Company, did you?

A I assume so, yes sir.

Q Now, in your testimony on direct examination, you said that 3,500 shares of the stock of this company was put over here in some bank. Under what conditions was that stock taken up and put over there, what was the arrangement?

A The arrangement which I had with my creditors in my final working out of this organization, I was to take a deposit—

Mr Wyeth: Just a moment.

A (Continuing) And control the company.

Mr Hopkins: Go on.

Mr Wyeth: As far as the parties that I represent are concerned, I don't know about the others, the use of the words "my creditors", some of our claims are against W. H. Schott individually, that if anybody represented him, the authorities should be shown.

97 Mr Hopkins: Well, you can get at that on examination. Don't interrupt me.

Mr Wyeth: We don't admit that this committee represents any of the parties that we represent here.

The Court: Was that trust arrangement in writing, Mr Schott?

A Yes sir. It will probably clear up some of the points

here if I can go back a little further. I think it will be understood clearer. In May, 1907, I was in financial difficulty at that time. I made an arrangement with my creditors that existed at that time for a basis of carrying on the business. A committee was appointed that acted as an advisory and financial committee in conjunction with myself.

Mr Hopkins: Q. Can you give a statement now of who those creditors were?

A They consisted of the Knight & Jillion Company of Indianapolis, John Davis Company of Chicago—

Q The claimant in this case?

A Yes sir.

The Court: Yes.

A But not on this account. On an old account. The American Radiator Company, United States Cast Iron Pipe & Foundry Company, some three or four banks—well, there was about eleven, as I remember it, total, that was involved.

Mr Hopkins: Q The aggregate indebtedness amounted to what?

A Oh, I forgot the amount. It was some sixty or seventy-five thousand outside of the secured claims. In the working out of a plan to undertake and carry the business through and to protect everybody, this corporation was suggested and this plan followed out. That was a part of my agreement. In putting it through on this basis I was to deposit the control of the company, under an agreement with the American Trust & Savings Bank, and in that trust agreement there was, as I remember it, three men appointed to act as voting trustees to elect directors until such time as all of the covenants had been carried out. That old list of creditors had agreed to an acceptance of some of this first preferred stock provided I would put into the treasury a certain amount of cash, and that is why the stock was divided into two classes.

Q And so the John Davis Company agreed to accept some of this stock?

A They had for the old account

Q Yes.

Mr McKenzie: That didnt apply to this account at all?

A No, sir.

Mr Hopkins: Q How much did they agree to accept?

A As I remember it, it was around an eleven thousand dollar item.

The Court: These 3,500 shares were in the control of the voting power?

testimony of
W. H. Schott.

A That was simply for voting purposes, yes sir. They held that for my benefit, but the voting power was vested
99 in these trustees.

Q And that was the controlling power of the corporation?

A Yes, sir.

Mr Hopkins: Q That was your personal control?

A Yes, sir.

Q And it was that voting power that elected these board of directors whose names have been mentioned?

A The initial board of directors was elected by agreement. That was the board that was supposed to prevail. I have forgotten whether they were listed in this trust agreement, but I assume that was the same board that had been listed there, but if it hadn't, the trustees at the expiration of their term, had the power to elect such directors as would be satisfactory to them, so as to take the control of the board out of my hands.

Q Yes. Was the John Davis Company a party to these negotiations leading up to the formation of this corporation known as the Schott Engineering Company?

A Well, Mr Hibbard, the president of that company, was one of the members of the creditors committee, and he worked in conjunction with the balance of them there, and we all worked together on that, in working out the plan.

Q Yes. And the plan was to culminate and did culminate in the formation of this corporation known as the Schott Engineering Company?

A Yes, sir.

Q And it was in pursuance of that agreement, was it,
100 that you transferred all your property and interests that has been mentioned here in that contract over to the Schott Engineering Company?

A It was.

Q Yes. I will ask you if after that date you had any personal control over any of the property or interests that you transferred to the Schott Engineering Company?

A No.

Q You did not. After the second day of January, 1909 did you have any personal interest in the completion of the contract that is under consideration in this case?

Mr McKenzie: I object to that.

The Court: That is a question of law from the facts. think that is objectionable.

Mr Hopkins: Well, perhaps in that form it would be. I will ask you this: If personally you did anything to carry out this contract after the 2nd day of January, 1909, when this contract was made with the Schott Engineering Company,—personally?

A After the 2nd of January, anything that I did was done on behalf of the corporation.

Q Now, you stated in your direct examination that the board of directors managed the corporation. Now, I will ask you if any action was taken by you during the time from the formation of this corporation up to the time that it went into the hands of the bankrupt court on your own initiative and without authority from the board of directors of the company?

101 A No sir, everything was done after consultation with the members of the board there that acted in conjunction with me, who had been members of the old committee.

Q Yes. They were then acting—from the time of the organization of the corporation they acted as directors of the company, didnt they?

A Yes sir.

Q And your action was in harmony with the directors?

A Yes sir.

Q And not otherwise?

A No sir.

Mr Hopkins: I think that is all, if your Honor please.

Redirect Examination by Mr McKenzie.

Q Was this arrangement with the John Davis Company by which stock was to be taken for this old account ever carried out?

A No sir.

Q Why?

A For the same reason that we never got the full fifty thousand paid into the treasury as provided for.

Q So that the John Davis Company never took any stock?

A No, sir.

Q Did you have any agreement of any kind with Mr Hibbard or anybody representing the John Davis Company with reference to its indebtedness other than this old account?

A No, sir.

Q That would apply also to the corporation?

A Yes sir.

testimony of
W. H. Schott.

Q By the old account you mean that prior to that
102 involved in this suit?

A Yes sir.

Mr McKenzie: You havent any objection to me identifying
four letters here, have you?

Mr. Hopkins: No.

Mr. McKenzie: Q You are familiar with the signature of
J. P. Guest, Vice-President and Treasurer of the John Davis
Company?

A Yes, sir.

Q Will you look at these four letters and state whether or
not they are in his handwriting?

A They are.

Q These letters came from the same file, John Davis file
that other letters with reference to this claim—

Mr. Hopkins: That is the file you complained about this
morning, is it?

Mr. McKenzie: Yes, sir.

Mr. Hopkins: All right.

Mr. McKenzie: Do you want to look at these letters, Sena
tor?

Mr. Hopkins: We object, the usual objection. I dont care
whether they go in or not.

Mr. McKenzie: I offer these four letters in evidence. The
first is dated—as exhibits for John Davis Company. You
have the numbers there. The first is dated March 3, 1909,
addressed to W. H. Schott, and signed, "The John Davis
Company;" the next is April 20, 1909, addressed to W. H.

Schott; the next is July 21, 1909, addressed to W. H.
103 Schott signed by the John Davis Company; and the next
is August 10, 1909, addressed to W. H. Schott.

Mr. Hopkins: Is that all, Mr. McKenzie?

Mr. McKenzie: That is all.

Re-cross Examination by Mr. Hopkins.

Q Now, Mr. Schott, it is a fact, is it not, that all of these
parties representing the creditors committee at the time of the
organization of this company took stock in the company, did
they not, provided that you should do certain things later?

A No, the stock was never delivered.

Q It wasnt delivered then, but they subscribed for it, didn't
they?

A They agreed to take it whenever I paid in \$50,000 in the treasury.

Q Yes. How many shares of stock—was the 3,500 shares of stock that was agreed—

A No, sir.

Q That was put up?

A That was out of the 750 shares we were to get.

Q That was out of the 750?

A Yes.

Q How many of the creditors agreed to take stock at the formation of the corporation?

A Oh, I think all of the old ones agreed to it. There was a settlement made with two or three of them.

Q There was a settlement made with two or three of them?

104 A Yes, sir. They did not wait until all the money was paid in.

Q They took the stock?

A Yes, sir.

Q I will ask you if they did not encourage you to dispose of this stock to outsiders, and to people that would buy?

A They were all interested in having it go along.

Q Yes. Everyone of these parties, they assisted in the preliminary proceedings. Now, the John Davis Company was one of the parties, was it not, that agreed to take this stock?

A Yes, sir.

Q And it was under that arrangement that the corporation was formed, as you have already stated?

A Yes, sir.

Mr. Hopkins: That is all.

The Court: About how much stock was sold for cash out of that \$50,000, about \$35,000?

A About \$36,300 is my recollection was delivered and paid in, something like that.

Mr. Allen: Was there any arrangement with any other of your creditors than those that have been named here relative to taking stock?

A I have forgotten whether the power of stock was delivered by settling a subsequent account, or whether that applied against the old account.

Q So that was the only other one?

A That is the only one I remember.

105 Mr. Allen: That is all.

(Whereupon said letters last above referred to were offered and received in evidence, marked "John Davis Company Exhibits 2, 3, 4 and 5" respectively, and are in the words and figures following, to-wit:)

John Davis
Exhibit 2.

106

JOHN DAVIS EXHIBIT 2.

Copy.

John P. Guest, Treasurer.

The John Davis Company

Established 1864,

Incorporated 1889.

Halsted, 22nd & Union Sts.

Address all communications to the
Company.

Chicago, Ills. March 3rd, 1909.

W. H. Schott,
1108 American Trust Bldg.,
Chicago.

Dear Sir:—

Enclosed please find note, duly cancelled, which was due to-day, having received from you a renewal and check covering interest on enclosed.

Yours respectively,

THE JOHN DAVIS COMPANY,

(Signed) J. P. GUEST,

Treasurer

JPG/BB

107

JOHN DAVIS EXHIBIT 3.

John Davis
Exhibit 3.

Copy.

John P. Guest, Treasurer.

The John Davis Company

Established 1864,

Incorporated 1889.

Halsted, 22nd & Union Sts.

Address all communications to the
Company.

Chicago, Ills., Apr. 20th, 1909.

W. H. Schott,
American Trust Bldg.,
Chicago.

Dear Sir:—

We are enclosing you herewith the statement of your account which you mailed us a few days ago.

Yours truly,

THE JOHN DAVIS COMPANY,

J. P. GUEST (Signed)

Sec'y & Treas.

JPG/BB

108

JOHN DAVIS EXHIBIT 413x

John Davis
Exhibit 41

Copy.

John P. Guest, Treasurer.

The John Davis Company

Established 1864,

Incorporated 1889.

Halsted, 22nd & Union Sts.

Address all communications to the
Company.

Chicago, Ills., July 21st, 1909.

W. H. Schott,
1508 American Trust Bldg.
City.

Dear Sir:—

Referring to our account. The writer has let this matter run along, hoping that we would hear from you from time to time, but as nothing has been done on this this year, we feel that in justice to ourselves, we should request a good

John Davis
Exhibit 413x.

sized check on account. Of course, you appreciate the fact that two-thirds of this material was furnished last year and the balance during the current season, some three or four months ago.

We have felt here, particularly the writer, that inasmuch as we had granted you so many favors in the past that our account would be one of the early ones to be taken care of and have no doubt but that you have the same feeling. We take it for granted that your work has progressed at the Lake Bluff so that some good sized vouchers would be forthcoming from the Government.

Kindly advise what we may expect on this.

Yours truly,

THE JOHN DAVIS COMPANY,

(Signed) JOHN P. GUEST,
Sec'y & Treas.

John Davis
Exhibit 5.

109

JOHN DAVIS EXHIBIT 5.

Copy.

John P. Guest, Treasurer.

The John Davis Company

Established 1864,

Incorporated 1889.

Halsted, 22nd & Union Sts.

Address all communications to the
Company.

Chicago, Ills. Aug. 10th, 1909.

W. H. Schott,
1108 American Trust Bldg.,
City.

Dear Sir:

Early last week we sent you an itemized statement of our account and asked you to have this checked up and advise us if it corresponded with your books. May we not ask you to give this your early attention, and oblige,

Yours truly,

THE JOHN DAVIS COMPANY,

(Signed) J. P. GUEST,
Sec'y & Treas.

10 Mr. Peffers: Mr. McKenzie, did you show that it was a corporation organized under the laws of Maine. I for-

Testimony of
W. H. Schott

ot.
Mr. McKenzie: I think that appears.

Mr. Peffers: Mr. Schott said something about that, but I don't think you showed that.

Mr. McKenzie: Do you want him to come back?

Mr. Peffers: Yes, bring him back.

Mr. Hopkins: Mr. Schott, step back just a minute.

Q. I am not clear as to what they had developed about the organization. What was the date of the organization of the Schott Engineering Company, and where was it organized?

A It was organized in Portland, Maine, on December 29, 1908.

Mr. Peffers: Under the laws of the State of Maine?

A Under the laws of the State of Maine.

Mr. Hopkins: Yes.

Mr. Peffers: That is all.

Mr. Hopkins: That is all. The juror wants to know what that question was. Shall I state it to him?

The Court: All right.

Mr. Hopkins: The question was as to where the Schott Engineering Company was organized. It was organized, as stated, under the laws of Maine. They organized corporations in all states you know.

111 J. W. MORTON called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Testimony of
J. W. Morton

Q What is your name and place of residence, Mr. Morton?

A J. W. Morton. 6028 Langley Avenue, Chicago.

Q What is your present occupation?

A Accountant.

Mr. Hopkins: What?

A Public accountant.

Mr. McKenzie: Q During the year 1908 and the spring of 1909 you were bookkeeper, head bookkeeper for the John Davis Company?

A Yes sir.

Q And as such, you had charge of their accounts?

A Yes sir.

testimony of
J. W. Morton.

Q What is the book which I am now showing you?

Q This is the sales journal, copy of the billing that was sent to the customers.

Q Of the John Davis Company?

A Of the John Davis Company, yes sir.

Q That constitutes a book of original entry?

A Book of original entry.

Mr. Hopkins: That book is called what?

A The sales journal.

Mr. McKenzie: If you will turn to that memorandum, it will shorten that. During the year 1908, beginning on 112 September 26, 1908, will you give the sales from the John Davis Company to W. H. Schott, up to December 31, 1908, the dates and amounts. Not from the books, but from the—

A From the memoranda here?

Q From the statement of account.

Mr. Hopkins: Have you verified those so that you know they are correct?

Mr. McKenzie: They are all correct, I know.

A September 26, \$2552.81; October 3, \$213.08; October 5, \$2865.95; October 6, \$2590.61; October 7, \$1351.41; October 12, \$16.16; October 12, \$31.45; October 26, \$35.47; October 17, \$1417.54; October 28, \$9.90; November 6, \$1362.38; November 7, \$2583.87; November 17, \$1.73; November 17, \$28.97; December 3, \$1.07; December 12, \$62.22; December 18, \$0.25. Do you want all of these?

Q You have figured up the total for the year, for these shipments you have read?

A Yes sir.

Q What is that total?

A \$15,124.91.

Q The next shipment was February 3, 1909, was it?

A Yes, February 3, 1909.

Q Will you please read from the journal that entry?

A It is dated February 3, 1909, W. H. Schott, 1126 American Trust Building, City, account of the Naval Training Station, North Chicago, Illinois. Then it gives order number 4005. The amount is \$18.76.

113 Q There are similar entries in the books during February, March and April, are there not?

A Yes.

Q And they are all charged to W. H. Schott?

A Yes.

Q And they are all similar to that entry?

A All similar to that entry, that is, in the manner of billing, with the different amounts.

Mr. Hopkins: In the matter of billing?

A Yes.

Mr. McKenzie: Please read those items as shown on the statement?

A What is that, I didnt get that question?

Q Read the other entries as shown on that statement?

A February 3, \$18.76; February 3, \$1.66; February 5, \$1.58; February 1st, \$2.24; February 4, 42 cents; February 5, \$2.28; February 25, \$190.23; March 9, \$15.60; March 17, \$38.00; March 23, \$44.13; March 20, \$419.26; March 13, \$28.67; March 29, 61 cents; March 31, \$27.00; April 3, 25 cents; April 5, \$1.30; April 16, \$5975.23; May 10, 50 cents.

Q Making a total for 1909 shipments of—

A Of \$6767.72.

Q Please read the credits upon that entire account for 1908 and 1909?

A October 8, 1908, \$170.55; October 21, \$5.75; December 7, \$291.17; December 30, \$273.52; April 6, 1909, \$11.79; August 13, \$13.50; August 14, \$18.23; December 22, cash \$4,446.42.

Q Leaving a net balance of what?

A \$16,661.70.

114 Q Have you figured the interest on that balance from August 16th, 1911, to May 20th, 1913?

A Yes, I did. It must be on that slip there.

Q What is the amount of that interest?

A \$1,465.23.

The Court: We will take a recess for five minutes.

(Short recess).

Mr. McKenzie: Q Mr. Morton, all of the original entries with reference to the claim you have been testifying about here are charged to W. H. Schott, and shipped to him care of the Naval Training Station as shown by our books?

A Yes sir.

Mr. McKenzie: In this connection, I wish to introduce in evidence the last page of the order book from W. H. Shott, engineer, containing orders No. 2902 to 4000, running from September 24th, 1908 to January 28th, 1909, being the volume preceding one of those that was lost, reading as follows:

testimony of
J. W. Morton.

W. H. Schott, American Trust Building, Chicago; Requisition number 4000. Chicago, January 28, 1909. Messrs. John Davis Company; address, Chicago. Please ship to W. H. Schott, LaFayette, Indiana, care of Merchants Electric Light Association and so forth, mentioning a lot of material, and signed W. H. Schott, by Payne. And I ask leave to substitute a copy. I will ask to have this marked for identification, mark it Davis' Exhibit 1.

(Document marked as requested).

The Court: That does not relate to any of the material here in question?

Mr. McKenzie: It does not. It simply shows that at that date they were using the order blanks of W. H. Schott.

The Court: In other matters?

Mr. McKenzie: Oh, yes.

Mr. Peffers: In other matters.

Mr. McKenzie: In other matters.

Mr. Hopkins: Schott had other business than this.

The Court: Let it go in subject to objection. I don't see the materiality of it yet, but I may later.

John Davis
Exhibit 1.

Which said document, last above referred to, marked Davis Exhibit 1, so offered and received in evidence as aforesaid, is in the words and figures following, to-wit:—

116

JOHN DAVIS EX 1

Copy

W. H. Schott

1100-1126 American Trust Building
Chicago

Chicago, Jan. 28" 1909

Requisition No. 4000

Messrs. Jno. Davis Co.

Address, Chicago.

Please ship to W. H. Schott, La Fayette—Indiana
Care Merchants Electric Lt. Ass'n.

Via Monon Ry. LaFayette Car—Rush.

- 2—4" floor flanges,
- 2—pes. 4" pipe 24' long, threaded each and
- 2— " 3" " 13'-2" long; standard length thread, on one
end and threaded down 6" on other ends.
- 2—4 x 3 Gtd Couplings,
- 2—4 x 3 Ex. hvy Gtd. Ells.
- 1—Pc. 4" pipe, 7'-0" long, threaded each end.

1—1½" Eclipse low Pres. reg. valve, fig. 81 pp. 259 (by
x-press)
Confirms phone order Payne to Schmeal, even date.
Davis Ex 1

- N Deliver no invoices to employees. Mail same to 1108
American Trust Building, with bill of lading.
- O Will not be responsible for goods delivered without requi-
sition
Always put this requisition number on your invoice.
- T Will not pay for boxing, packing or cartage.
Goods not shipped check "O" and ask instructions.
- E Make no back orders.

W. H. SCHOTT,
By PAYNE.

117 Mr McKenzie: I believe counsel here admit generally
material covered by these accounts went into the Naval
Training Station. We shall not undertake to prove that.

Mr Hopkins: Went into the Naval Training Station by
the Schott Engineering Company. That is our admission,
and none other.

Mr McKenzie: You refuse, as I understand, to admit that
this material went into the Naval Training Station, just that
admission alone?

Mr Hopkins: Well, Mr Peffers—

Mr Peffers: They have understood here what I was will-
ing to state about that. I have nothing further to add to it.
That any of the material that went there after January 1,
1909 was used by the Schott Engineering Company. That is
the fact, that is what I am willing to admit in the record.

Mr McKenzie: You are not willing to admit merely it
went into the work?

Mr Peffers: I am willing to admit just what I said, what

Testimony of
J. W. Morton.

I have told you for six weeks, and you know well, I told you all along.

Mr McKenzie: Let the record show we do not agree to that part of it, that it was put in by the Schott Engineering Company.

The Court: You are not asking the stipulation, of course, and they make such an admission as they please.

118 Mr Peffers: Why, if your Honor please—

The Court: Of, course—

Mr Peffers: They shipped stuff up there. After January 1st, every dollar's worth of it was used by the Schott Engineering Company, and I am willing to admit that.

Mr Wyeth: Did it go into that job?

The Court: Did it go into that job?

Mr Peffers: Certainly, it went in the job and was used by the Schott Engineering Company.

The Court: They are willing to admit it went in the job—

Mr Hopkins: With that proviso.

The Court: That it went in there, but was put in by the Schott Engineering Company.

Mr Peffers: Just the exact fact, I am willing to admit the exact truth. The legal effect, if your Honor please, I will not discuss now at all.

The Court: Whether that company was really Schott is another question entirely.

Mr Hopkins: Yes.

Mr Wyeth: Now, whether under the contract—it makes no difference whether it was Schott or not.

The Court: That is open.

Mr. Hopkins: We will discuss that later.

The Court: That is an open question.

Mr Wyeth: That is open, too.

The Court: I don't know what kind of a corporation 119 this was, or who owned the stock or anything about it.

That, of course, will come out later. If Schott owned all of the stock of that company it might make a difference.

Mr McKenzie: I think that is all.

Mr Hopkins: I understand the stipulation goes in as we have made it?

Mr McKenzie: The stipulation, with our discussion explaining it.

Cross-Examination by Mr. Hopkins.

Testimony of
J. W. Morton

Q You were in what position with the John Davis Company?

A I was their bookkeeper.

Q Yes. I will ask you to look at that letter under date of August 12, 1909. Do you recognize that as the signature of the John Davis Company?

A Yes, yes.

Q I ask you to look at the letter directed to the John Davis Company, under date of August 11, and ask you if that is the letter received by the John Davis Company, to which the one of August 12 is an answer?

A Well, I could not say. I will compare them and see.

Q They will show for themselves?

Yes, that is our—

Q Yes. I will ask you if the letter under date of August 13 is another letter that has reference to the same subject, and received by the John Davis Company?

120 A Yes.

Q Please look at letter under date of December 21, 1909, and state if that is one which was received by your company, by the John Davis Company?

A Yes, it is addressed to the John Davis Company.

Q Now, just look at the letter under date of July 24, 1909, addressed to the Schott Engineering Company. Is that the signature of the John Davis Company?

A Yes.

Q Look at letter dated July 29, 1909, addressed to the Schott Engineering Company, and state if that is the signature of the John Davis Company?

A It is.

Q Look at letter under date of March 18, 1909, and state if that is a letter received by the John Davis Company, or a copy of it?

A It is addressed—of course, I can't say whether we received it or not, but it is addressed to us.

Q You have no doubt about it, have you, at all?

A I have no doubt at all about it.

Q Look at this next letter, and state if that is the signature of the John Davis Company?

A Yes.

Q What is the date of that letter?

A July 27, 1909.

testimony of
J. W. Morton.

Mr. Hopkins: Mark those exhibits 22 to 29 inclusive.
(Documents marked Defendant's Exhibits 22 to 29 inclusive)

Mr. Hopkins: Do you want to look at them before I read them?

Mr. McKenzie: Yes.

(Handing papers to Mr. McKenzie)

121 Mr. McKenzie: I object to those letters as incompetent, irrelevant and immaterial, and not bearing upon any issues in this case.

The Court: They may be received subject to objection.

Mr. Hopkins: Q I will ask you also if that letter, under date of June 11, 1909, addressed to W. H. Schott, has the signature of the John Davis Company?

A I am not familiar with that signature. It is on the letterhead, all right.

Q Who does it purport to be written by?

A The president.

Q The president of the company?

A Of the John Davis Company, yes sir, but he became president after I left the concern.

Q Well, was he president on that date, June 11, 1909?

A Yes, it is my belief he was.

Q It is your belief that he was president at that time?

A Yes, sir.

Q It is written on the John Davis Company letter heads, is it not?

A Yes.

Q And signed by the John Davis Company, by—

A By the president, Mr. Raymond.

Q By the president?

A Yes, sir.

Q You know him, do you not?

A No.

Q Yet you dont know his signature?

Mr. McKenzie: It is admitted that is the signature of the president, Mr. Raymond.

122 Mr. Hopkins: It is admitted the signature is the signature of Mr. Raymond, President of the Company. Mark that Defendant's Exhibit 30.

The document was marked as requested.

Mr. Hopkins: Now, I will read these letters. The first one is dated August 11, 1909 to the John Davis Company,

Chicago, Illinois, and signed by the Schott Engineering Company.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 22" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

EXHIBIT #22.

"August 11th, 1909.

The John Davis Company,
Chicago, Ill.

Gentlemen:—

Attention Mr. Guest—Replying to your letter, requesting us to verify your statement of July 31st, amounting to \$22,36.68, beg to advise that our records show a balance due you at \$22,192.17, leaving a difference in the amounts of \$14.51. This difference is made up of the following items:—
Your charge of March 23rd for additional interest \$.50 which amount we will allow if you will send us a duplicate bill.

"We find that you have not given us credit on your statement for your credit memorandum dated December 2nd, amounting to \$12.28.

"Also you have not given us credit on invoice of September 26th, amounting to \$18.23.

"Also there is a difference of \$13.50 between the amount of your credit memorandum of September 8th, amounting to \$170.55 and our invoice, which was for \$184.05. This \$13.50 was for freight and cartage on water pipe returned to you, which our Mr. Payne says should be allowed.

"By giving us credit for the three items enumerated above and sending us your duplicate invoice for \$.50 the accounts will agree. Trusting the above explanation is clear and satisfactory, we remain,

Very truly yours,

THE SCHOTT ENGINEERING COMPANY.

C.R.S.—S.

Auditor.

Mr Hopkins: In answer to that letter I will read the following dated the next day August 12, 1909, to the

Schott Engineering Company from the John Davis Company.

Defendant's
Exhibit #23.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 23" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT #23.

"John D. Hibbard, President. George F. Hughson, Vice-Prest. & Secy. John P. Guest, Treasurer.

The John Davis Supply Company

Established 1864.

Incorporated 1889.

Halsted, 22nd & Union Sts.

Address all communications to the Company, Chicago, Ills.
Aug. 12th, 1909.

Schott Engineering Co.,
Mr. Scott, Auditor,
Chicago.

Dear Sir:—We have yours of the 11th inst., and wish to thank you for your attention. We are enclosing you a copy of our charge of March 23rd, 50c; it appears that this is one day's interest on a note which matured about this time. Just

how this came about the writer is unable to state, except that our city collector was obliged to pay the additional 50c in order to get the note and the matter was put through on your account as a cash item. You will oblige us if you will credit this to our account.

"Now about the item of credit, \$12.28; We find this was utilized in your settlement to us of Dec. 28th. We think this came about from the fact that our original credit memorandum had just this amount deducted and later we agreed to allow this to you and you, in making the settlement, utilized the full amount of our credit and did not consider this \$12.28. In order to get this amount on our books, we were obliged to put through this additional credit of \$12.28. Kindly advise if we are not correct in this.

"We do not find in any of our records the freight bill covering our invoice of Sept. 26th. We should have this in order to put through the credit for freight amounting to \$8.23, as stated by you. 18.23

"Now about the \$13.50 item; the writer finds some correspondence about this and in order to make a long story short, we will put a credit memorandum through to you for this item.

Defendant's
Exhibit #23

Yours truly,

THE JOHN DAVIS COMPANY

J. F. GUEST,
Sec'y & Treas."

26 Mr. Hopkins: Then, in answer to that, the Schott Engineering Company wrote this letter to the John Davis Company.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 24" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

Defendant's
Exhibit #2

DEFENDANT'S EXHIBIT #24.

"August 13th, 1909.

The John Davis Co.,
Mr. J. P. Guest,
Chicago.

Gentlemen:—We have your favor of August 12th and in reply will say, upon investigation we find that you rendered us two credit memorandums for the item of \$12.28 and we utilized one of them in our settlement of December 28th, 1908, as stated by you. We are therefore, giving you credit on our books for the other item and also for the 50c for additional interest on note.

"We enclose herein, our invoice for \$18.23 covering freight on cars #9510 & #39,094, with the receipted paid expense bills attached. We note you have given us credit for the amount of \$13.50 which was in dispute and with these corrections, our books become reconciled with our statement.

127 "Thanking you for your courtesies in the matter, we are,

Yours very truly,

THE SCHOTT ENGINEERING COMPANY,
Auditor.

CRS—C.
Enclosures."

128 Mr Hopkins: The next letter that I will read is dated December 21, 1909, to the John Davis Company from the Schott Engineering Company.

Defendant's
Exhibit #25.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 25" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT #25.

(Carbon Copy)

"December 21, 1909.

The John Davis Co.,
2207 So. Halsted St.,
Chicago.

Gentlemen: We are today in receipt of our estimate from the government, but as usual we have had the same cut down, so we are sending you check for the full amount we have received from them, namely, \$4,446.92 to apply on account.

"As soon as we get some more collections in, and can spare the money, we will send you enough more to make up the full \$5,000.00 but this is the best we can do today.

Yours very truly,

THE SCHOTT ENGINEERING COMPANY,

WHS—C.
Enclosure."

President.

129 Mr Hopkins: Next I will read this letter dated July 24, 1909, to the Schott Engineering Company to the John Davis Company.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 26" was read by Hopkins, and the same is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT #26.

Defendant's
Exhibit #26

(On Letter-head of John Davis Company.)

"Chicago, Ills., July 24th, 1909.

Schott Engineering Co.,
1108 American Trust Bldg.,
Chicago.

Gentlemen:—Referring to the enclosed order received this morning from your people. Inasmuch as you have the patterns for this order, allow us to suggest that you turn the order and patterns over to Mr. Hughson, who, we believe, will give you better satisfaction than we can on this particular order.

"As you know, we are not doing anything here in the manufacturing line and would be obliged to have you ship the patterns to our Kewanee plant and this would entail more delay than if you took the matter up direct with the Hughson Steam Specialty Co., 5021 State St. Your Mr. Schott will appreciate the condition of this thoroughly.

Yours truly,

THE JOHN DAVIS COMPANY

J. P. GUEST,
Sec'y & Treas."

131 Mr Hopkins: The next letter that I will read is dated July 29, 1909, to the Schott Engineering Company, 1108 American Trust Building, Chicago.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 27" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

Defendant's
Exhibit #27.

DEFENDANT'S EXHIBIT #27.

(Written on letterhead of John Davis Co.)

"Chicago, Ills., July 29th, 1909.

Schott Engineering Co.,
1108 American Trust Bldg.,
Chicago.

Gentlemen:—We have yours of the 28th and have asked our people to ship you the patterns as you request. Of course we had previously only ordered the patterns for the 2" and 3" extra heavy expansion joints, as this was all that you mentioned. The writer was under the impression that these were in your hands before this. However, we have complied with your request.

Yours truly,

THE JOHN DAVIS COMPANY

J. P. GUEST

Sec'y & Treas."

JPG/BB

132 Mr Hopkins: The next letter that I will read is dated March 18, 1909, to the John Davis Company from the Schott Engineering Company.

Defendant's
Exhibit #28.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 28" was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT #28.

"March 18th, 1909.

The John Davis Company,
22nd & Halsted Sts.,
Chicago.

Attention of Mr. Guest. Gentlemen:—At Mr. Schott's request we are enclosing to you herein a 60 day renewal note to take up the paper for \$1500.00 due on the 20th. inst. together with check for \$15.00 to pay interest on matured note.

"Trusting this will be entirely satisfactory to you at this
me and that you will forward the cancelled note.

Defendant's
Exhibit #28

Yours very truly,

SCHOTT ENGINEERING CO.

CHAS. R. SCOTT,

Auditor."

3 Mr Hopkins: The next letter that I will read is dated
July 27, 1909, to the Schott Engineering Company from
the John Davis Company.

Which said letter last above referred to, so offered and re-
ceived in evidence as aforesaid, marked "Defendant's Ex-
hibit 29" was read by Mr. Hopkins, and the same is in the
words and figures following, to-wit:

Defendant's
Exhibit #29

DEFENDANT'S EXHIBIT #29.

(Written on John Davis Co. letter-head.)

"Chicago, Ills., July 27th, 1909.

Schott Engineering Co.,
1108 American Trust Bldg.,
Chicago.

Gentlemen:—Acknowledging yours of the 26th inst., we
have today ordered the National Tube Co. plant at Kewanee
to ship to Mr. Hughson the two patterns for the expansion
joints in question.

Yours truly,

THE JOHN DAVIS COMPANY

J. F. GUEST

Sec'y & Treas."

JPG/BB

134 Thereupon counsel for Defendant offered in evidence
the following letter from the John Davis Company to
W. H. Schott, marked "Defendant's Exhibit 30", which was
and is in the words and figures as follows, to-wit:

Defendant's
Exhibit 30.

135

DEFENDANT'S EXHIBIT 30.

The John Davis Company
Halsted, 22nd & Union Sts.

Chicago, Ills., June 11th, 1909.

W. H. Schott,
1100 American Trust Bldg.,
Chicago, Ill.

Dear Sir:—

Sometime ago we agreed to accept, in lieu of our indebtedness against you at that time, several, preferred accumulate shares of stock, in a company to be organized under the laws of Maine and known as the Schott Engineering Company, subscriptions to be binding upon us only when \$50,000 of the preferred stock of that Company had been sold by you, to be paid as directed by the Board of Directors.

You have not complied with this portion of the agreement and considerably more than a reasonable time for your doing so has elapsed. We, therefore, notify you that unless your part of the arrangement is fulfilled on or before July 15th next, we will, without further notice, cancel our proposition to accept said stock in lieu of indebtedness.

Yours very truly,

THE JOHN DAVIS COMPANY
H. S. RAYMOND,
President

HSR/BB

136 Mr. Hopkins: You will admit that is the President's signature? (Indicating signature on document.)

Mr McKenzie: Yes.

Mr Hopkins: It is admitted that the affidavit of Mr. Raymond—the treasurer, was he, of said corporation?

Mr Peffers: I think the treasurer.

Mr McKenzie: He was president and treasurer as I understand it.

Mr. Hopkins: It is admitted that is the genuine signature of the president and treasurer of the company, of the John Davis Company, on the claim filed in the bankruptcy court charging the Schott Engineering Company with the indebtedness that has been testified to here by these witnesses.

The Court: What is the amount given there?

Mr Hopkins: What?

The Court: What is the amount given there?

Mr Hopkins: The amount—it covers other items. The John Davis Company had other contracts with Schott that were taken over by the Schott Engineering Company, and that do not relate to this. And I only want to put in then such portions as have been testified to by the witness that covers this. And then I want to—the total amount sworn to was \$30,329.06. But, of course, that is—

Mr Peffers: \$18, thousand or nineteen thousand dollars on this job.

137 Mr. Hopkins: I offer that in evidence, the affidavit.

Mr. McKenzie: I object to it on the ground that it is irrelevant and immaterial; that it is a paper filed in a suit to which the Illinois Surety Company was not a party; and that it is not competent as proof of anything in this case.

The Court: It may be received.

Mr. Hopkins: I offer together with that, the statements and copies of the bills that have been sworn to by the witness upon the stand. They are all—

Mr. Peffers: They are all copies of what he has been testifying to. If you admit it is the same bills and items you have been testifying to, we won't put them in. That is what the fact is. I have compared it with your statement there.

Mr. McKenzie: We admit the items to which Mr. Morton has testified are all included in that affidavit.

Mr. Hopkins: In that affidavit.

Mr. Peffers: Filed before the Referee.

Mr. McKenzie: Without in any way waiving our objections.

Mr. Peffers: Yes.

Mr. Hopkins: That is all right.

Mr. Peffers: File mark July 8th, 1910.

Mr. Hopkins: Mark that affidavit as Exhibit "31" then.

Mr. Peffers: We will ask leave to substitute a copy for that in lieu of the original.

138 Mr. Hopkins: Yes. Now, I will read this exhibit 31.

Which said document last above referred to, so offered and received in evidence as aforesaid, marked "Defendant's Exhibit 31", was read by Mr. Hopkins and the same is in the words and figures following, to-wit:

Defendant's
Exhibit 31.

DEFENDANT'S EXHIBIT 31.

"Forms in Bankruptcy, as adopted and established by the U. S. Supreme Court. Form No. 1812. Printed and for sale by the Chicago Legal News Co.

Form No. 33.

Revised by James B. Bradwell to conform to Order XXI.

Proof of Debt Due Corporation.

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

In the Matter of
Schott Engineering Company, } In Bankruptcy,
Bankrupt. } No. 17328.

United States of America,
District of _____ } ss.
State of _____,
County of _____

139 "At Chicago, in said Northern District of Illinois, on the 6th day of July, A. D. 1910, came H. S. Raymond, of Chicago, in the County of Cook, and State of Illinois, and made oath and says that he is (1) Acting Treasurer of the John Davis Company, a corporation incorporated by and under the laws of the State of Illinois, and carrying on business at _____ in the County of Cook, and State of Illinois, and that he is duly authorized to make this proof, and says that the said Schott Engineering Co., the person (2) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said corporation in the sum of \$30,329.06, that the consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special order and request as shown by statements here-

attached, and partly by promissory notes hereto attached; the Schott Engineering Co. assumed and agreed to pay the liabilities of W. H. Schott for said goods for a valuable consideration, and no part has been paid; that there are no sets or counterclaims to the same (4).....

at said debt (5) due on the 8th day of May, A. D. 1908

hereto attached, marked "Exhibit A" and made a part hereof.

0 "That said debt consists of an open account of (6) _____ item _____ maturing at (7) _____ date _____; that on the (8) _____ due date hereof is _____ that no note has been received for such account, nor any judgment rendered thereon, and that said corporation has not, nor has any person by its order, or to the knowledge or believe of said deponent, for its use, had or received any manner of security for said debt whatever.

H. S. RAYMOND,
Acting Treasurer of Said Corporation.

Subscribed and sworn to before me this 6th day of July, A. D. 1910,

ALBERT N. HOBART,
Notary Public.
(Official Character)."

(Upon the back of the foregoing exhibit appears the following endorsement.)

"Filed at 3:00 o'clock P. M. this July 8th, 1910. Frank L. Wean, Referee in Bankruptcy."

141 Mr. Hopkins: We ask counsel for the Davis company to produce the circular letter that was sent out to the creditors by the Receiver of the Schott Engineering Company, through their attorneys, Pam & Hurd, on the order of Judge Landis, and the reply.

Mr. McKenzie: We have the letter; it was received by the John Davis Company, but no attention was paid to it,—no reply was made to that letter by the Davis Company.

Defendant's
Exhibit "A."

Mr. Hopkins thereupon offered in evidence the Receiver's letter produced by counsel, and the same was received in evidence, and marked Defendant's Exhibit "A", and is in the words and figures following, to-wit:

142 DEFENDANT'S EXHIBIT "A."

Central Trust Company of Illinois

Chicago, February 1, 1910.

To the Creditors of

The Schott Engineering Company.

Dear Sirs:

We enclose herewith a statement, drawn up by Messrs. Pam & Hurd, our Counsel, relating to a certain contract with the Government in which we, as Receiver of The Schott Engineering Company, are interested.

We request you to read the statement and then send us your reply so it will reach us before Tuesday, February 8th.

Yours truly,

CENTRAL TRUST COMPANY OF ILLINOIS,
Receiver for The Schott Engineering Co.

143 To the creditors of the Estate of
The Schott Engineering Company:

The Central Trust Company of Illinois was appointed receiver of The Schott Engineering Company on January 14th of this year. As you well know, the chief assets of this Company consisted of contracts in the course of completion with various persons and corporations for lighting, heating and power systems. In order to secure to the creditors the benefit of any profit there may be in these contracts, the receiver was authorized to continue the business of The Schott Engineering Company sufficiently long to make such investigation of the various contracts so it could intelligently report to the Court on the question of whether or not it will be to the best interests of the creditors of the estate to continue with any or all of them. Such investigation has been made as to some and is being made as to others.

At the time this receiver was appointed, The Schott Engineering Company was at work on a contract made July 30, 1908, by W. H. Schott with the United States Government. In January, 1909, The Schott Engineering Company was organ-

red, and among other contracts assigned to The Schott Engineering Company by W. H. Schott was this contract of July 30th. We are informed that in consideration of the assignment of these contracts, and other assets, turned over to The Schott Engineering Company by W. H. Schott, the said Schott received certain stock in said Company.

In consideration of the work to be performed on this contract made by W. H. Schott on July 30, 1908, with the United States Government, the Government was to pay a sum of about \$124,000. A supplemental agreement between Schott and the United States Government in April, 1909, added the sum of \$2,000 to the contract price, making the total about \$126,000.

All the work done on this contract since January, 1909, was done by The Schott Engineering Company. Payments have been made by the Government of over \$100,000, and while the vouchers have been made payable to W. H. Schott, they have been indorsed over by him to the Engineering Company. There is still due on this contract from the United States Government, the sum of \$26,000. There are debts due and owing for material in connection with said contract of about \$45,000. It will take an additional sum of \$10,000 to complete the work in its entirety. That will leave in claims due against this work, a sum of about \$55,000, and if the work is completed we will be entitled to \$26,000 still in the hands of the Government.

When W. H. Schott made the contract with the Government he gave to it a bond, with the Illinois Surety Company as surety, in the sum of \$31,000, to insure the faithful performance on his part of the contract. When the receiver was appointed, under the order of Court, it took possession of the property of The Schott Engineering Company at North Chicago (where this work is being carried on) and has continued with the work for three weeks. In the meantime the Admiral has notified the receiver that it must secure the consent of the Illinois Surety Company to continue with the work. The Illinois Surety Company, by its General Counsel, claims that it has nothing in common with The Schott Engineering Company, that their principal is W. H. Schott, individually, but as friends of the Court, they have suggested that if the work should be carried on by the receiver to a completion, any and all moneys realized therefrom and paid over to it by the Government, should be applied first to the payment of any and all

Defendant's
Exhibit "A."

indebtedness due under said contract,—meaning thereby that the creditors who have supplied material on this particular work should be paid out of the proceeds derived from said work, and that only after such debts are paid, can any sum be applied to the benefit of the general creditors.

Mr. Schott, the President of the Engineering Company, has stated to the receiver that he has a good claim against the Government for extras in the form of material and labor in 145 the sum of about \$40,000. We might say here that the

Admiral in charge of the work for the Government has taken issue with Mr. Schott on that question, and probably therefore, if any sum is realized from any claim for extras, it will only be after a contest.

This being the condition of affairs, the Central Trust Company of Illinois, through its counsel, prepared a petition setting forth these facts, presented the matter to the Court so as to have the benefit of his instructions, and when the matter came on for hearing, the Court, after being informed of the situation, asked what was the attitude of the creditors with reference to the question involved. Mr. Charles H. Ripley, attorney for the American Radiator Company, was there, representing it and the other creditors who filed the petition in bankruptcy, and he stated to the Court that on behalf of the creditors whom he represented, he thought it to the best interest of the estate that the receiver should continue on with this contract. The Court then, after taking the advice of those present, determined to permit the receiver to continue with the work until February 9, 1910, at which time the matter is again to be presented to him, and by which time he has asked that the receiver obtain an expression from the creditors as to their views, as to whether or not the receiver should continue with the work until its completion.

The receiver intends in the meantime also to investigate more in detail the question as to how much money will actually be needed to complete the work. The estimate of \$10,000 was made by Mr. Schott and was concurred in also by the Admiral representing the Government.

If the receiver can do the work for \$10,000 it will be entitled to receive \$26,000 from the Government. The question will then arise whether the \$16,000 that comes into the hands of the receiver over and above the amount necessary to complete this work shall be applied against the debts due on the

Particular contract or for the benefit of the general creditors. Defendant's Exhibit "A."

146 Necessarily, even if applied to the extinguishment of the debts on this particular work, there will be a reduction of \$16,000 in the amount of the claims filed against the estate.

The question upon which the Court wishes to have the opinion of the creditors is, if it should decide that the \$16,000 hereinabove mentioned should be applied in payment of the indebtedness due on this particular contract, do the creditors still believe it would be for the best interests of the general creditors that the receiver should be permitted to complete the work?

Should the Receiver not complete the work, the Illinois Surety Company, being on the bond of W. H. Schott, might enter upon the work and complete it. We are informed, however, that that is not their intention.

In that event the Admiral, the representative of the Government, states that new bids would be called for, which would involve additional guaranties by new contractors, all of which would materially, in his opinion, increase the cost, so that possibly the greater part of the \$26,000 would be used by the Government in the finishing and completing of this contract.

As we have stated above, the chief asset of the estate of the Engineering Company is in contracts, and in practically all of those contracts there is a surety, and the position of the Illinois Surety Company in the case of this contract with the Government, is probably the one that will be taken by the other sureties with reference to the contracts in which they are interested.

The receiver for its guidance, in order that it may observe the consensus of opinion of the creditors, and so that it may properly advise the Court, would very much desire an opinion from the creditors as to the policy that should be pursued with reference to these contracts. It will be the aim of the receiver to make an independent investigation on all the contracts which it takes charge of, and will not advise the Court to continue with the work on any unless it believes that a profit will accrue from such action.

147 We are writing this letter as counsel for the Central Trust Company of Illinois, and ask your reply hereto immediately so that we may present the views of the creditors on

Defendant's
Exhibit "A."

these questions to the Court at the next hearing of this matter, which is set for next Tuesday, February 8th.

Very truly yours,

PAM & HURD.

148 Mr Peffers: This is a copy of Section 8 of the by-laws of the John Davis Company, which I copied from their record books. It is section 8, "Duties of the President—" and so forth. "It shall be the duty of the President to exercise a general supervision over the entire business of the Company."

Mr McKenzie: What is that section?

Mr Peffers: Look at page 12.

Mr Hopkins: We should have enough admissions now to show it was the by-laws of the John Davis Company.

Mr Peffers: I am offering it as the by-laws.

Mr Hopkins: In existence at this time.

Mr Peffers: It is admitted it is a copy of section 8 of the by-laws of the John Davis Company. I will read it.

Mr Hopkins: Of the John Davis Company,—in force at this time.

Mr Peffers: Yes.

Mr. Hopkins: Then in force.

Mr McKenzie: Yes.

Mr Hopkins: It is admitted it is a by-law in force January, 1909, and prior thereto,—what is the date of the adoption,—in 1903 or 1893?

Mr McKenzie: In 1899.

Mr Peffers: Adopted in 1899, and still in force.

Mr McKenzie: Yes.

Mr Peffers: I will read it.

Defendant's
Exhibit 1.

149 Said document marked defendant's exhibit 1 of May 22, 1913 was read by Mr. Peffers in the words and figures following:

"Section 8; Duties of the President—" etc.

"It shall be the duty of the President to exercise a general supervision over the entire business of the company.

"The several officers of the company shall be responsible to him for the proper and faithful discharge of their several duties, and shall make such reports to him touching the business of the company under their charge as he may from time to time require. He shall execute all bonds, contracts or other instruments required to be made or executed for and on behalf of the company, and he shall sign all checks

proof of debt
due corpora-
tion.

that the said W. H. Schott, the person (2) by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of \$30,329.06 dollars and cents with interest from, 19....., at per cent. per annum; that the consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special order and request as shown by statements hereto attached and partly by promissory notes hereto attached that no part of said debt has been paid (3) none that there are no set-offs or counterclaims to the same (4) none, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

H. S. RAYMOND

Treasurer of said Corporation.

Subscribed and Sworn to before me, this 6th day of July A. D. 1910.

ALBERT N. HOBART

Notary Public.

[Official Character].

(Notarial Seal)

- (1.) If there is a treasurer, the deposition should be made by him; see Order XXI.
 - (2.) If a Voluntary Bankrupt, insert the word "by." If Involuntary the word "against."
 - (3.) If payments have been made, insert the word "except," followed by a statement of the payments.
 - (4.) If there are set-offs, etc., insert the word "except," followed by a statement of the set-offs, etc.
 - (5.) Insert here the word "became" or "will become."
- (Endorsed) ly 8—1910 3 20 Frank L. Wean Referee.

testimony of
C. J. Connell.

152 C. J. CONNELL a witness called on behalf of the use plaintiffs. having been first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Q Will you state your name and address, Mr. Connell?

A C. J. Connell, 72 West Adams street, formerly assistant secretary of the Universal Portland Cement Company, in charge of the accounting.

Q During the last half of the year 1908, you were assistant secretary of the Universal Portland Cement Company, in charge of accounting?

A Yes sir.

Q What is the book which I am handing you?

A Invoice book.

Q Is that the original book of entry?

A Yes sir.

Q Turn to invoice B-15907; will you please read that entry?

A "Chicago, August 8, 1908—"

Mr Peffers: August?

A "William A. Schott, American Trust Building, Chicago, Universal Portland Cement Company, two cars, 160 barrels of cement, \$585.72."

Mr Hopkins: That is in August?

Mr Peffers: August 8, 1908.

Mr McKenzie: If you will turn to the statement which you have—

Mr Peffers: That was how much? Five hundred and what?

153 A \$585.73.

Mr McKenzie: Will you turn to the statement again. There are several similar charges in that, and similar books, are there not?

A Yes sir.

Q Will you please give the dates and the amounts of those charges?

Mr Hopkins: Have you got the book there to show it?

A Yes sir.

Mr McKenzie: We have got it all right here, if you want to see it.

Mr Hopkins: All right, I wont put you to any trouble.

The Court: Read them.

A "August 8, \$585.73", that is the first one, I just read; "August 8, \$292.87; August 7, \$292.87; August 7, \$292.87; September 11, \$292.87; September 15, \$216.47; September 15, \$292.87; September 16, \$292.87; November 7, \$518; November 9, \$644."

Mr McKenzie: Making a total of how much?

A Total, \$4,014.29

Q What payments were made upon that?

A All payments was on October 30, 1908, cash on account, \$1,004.34. Then we allowed them credits for sacks returned,

Testimony of
C. J. Connell.

November 17, \$220; December 23, \$322.80, 1909; January 1 allowed them \$149.40; July 31, \$502.70; November 15, cash on account, \$815.05.

Q Making total credits of—

154 A Making total credits, \$3,014.29; balance due being \$1000.

Q You figure interest on this amount?

A Interest on this amount from August 16, 1911, to March 20, 1913, at five per cent, was \$87.95.

Q Making a total of—

A Making a total of \$1,087.95.

Q These items are all for cement?

A These items are all for cement.

Q All charged to W. H. Schott?

A All charged to W. H. Schott, and shipped to W. H. Schott, North Chicago.

Q During the year 1908?

A During the year 1908.

Mr McKenzie: It is understood that this material was used on the job?

Mr Peffers: Yes, all except the last two cars, November 7th and November 9th. I am not sure about those.

Mr McKenzie: You are not sure they received them?

Mr Peffers: No. We are not sure that they were used until after the first of the year.

Mr Hopkins: That they were used by the Schott Engineering Company, or anybody?

Mr Peffers: We did a lot of cement work there after that?

Mr McKenzie: Well, you agree that they were used on the job there by the cement company, or by Schott, or the Schott Engineering Company?

155 Mr Peffers: I think we may safely say that all except the last two cars were used by Schott, the last two cars by the Schott Engineering Company.

Mr McKenzie: You don't know about the facts?

Mr Peffers: There was a large amount of cement work done after the first of the year. That is my information.

The Court: All the items were paid except the last two.

Mr Peffers: Yes.

The Court: And they are partly paid?

The Witness: They are partly paid.

Mr Peffers: Well, pretty near.

Mr McKenzie: I have no independent knowledge of that.

Mr Peffers: Well, that is a fact, that they did a large amount of the cement work after the Schott Engineering Company took hold of the job. They were building these conduits.

Mr McKenzie: It doesnt make any difference to me who used it, if it was delivered to the company while Schott was still in charge.

Mr Hopkins: Well, we dont know whether it was or not.

Mr Peffers: Well, have you got anything to show there?

Mr Hopkins: When the last two items were delivered.

Mr McKenzie: To show where they were shipped from.

A Well, they were shipped from Buffington down here.

Q Buffington, down here 25 miles, just outside of the 156 line, between Gary and South Chicago.

The Court: Have you got the date of the shipment?

A Yes sir. The date of shipment is November 7th and 9th.

The Court: The same as you got it there?

A Yes sir.

The Court: That is the date of the shipment?

A The date of the bill of lading.

The Court: So it was delivered during that year, 1908, during that month.

Mr Peffers: Very likely.

The Witness: Without any question.

Mr Peffers: It will take probably ten days to come to Chicago and get up there, but there was a large amount of conduits, concrete conduits that was constructed after that time, that this cement,—that is what it was used for.

The Witness: About seven days would be a fair time.

Mr McKenzie: What is that?

The Witness: Seven days.

Mr. Hopkins: That is, under normal conditions, but you dont know what they were at this time. This was in November and December.

Mr. McKenzie: No, November 7th and 9th.

Mr. Hopkins: Well, take it November.

Mr Peffers: Anywheres from seven to ten days.

157 A It would be quick shipment in November, no car shortage or anything like that.

Mr Peffers: You say they returned all the sacks when the cement was used.

Mr McKenzie: Oh no.

The Witness: Not necessarily.

Testimony of
C. J. Connell.

Mr McKenzie: Not necessarily.

The Witness: Because they allow a bunch of sacks to accumulate until they get two or three carloads.

Mr Peffers: Now, here you got a shipment of sacks on January 12, 1909; then you got a shipment of sacks on July 31, 1909. The last shipment of sacks returned was as late as November, 1909. Now, you know, dont you, that the concrete work ran as long as April up there, not later than that.

A No sir.

Q Don't you know anything about that?

A No sir.

Mr Hopkins: You dont know anything about the use of the material at all then?

A Except that was used up. The sacks are not returned until they get a carload of them.

Mr McKenzie: You are willing to agree that this stuff was delivered to the job in 1908?

The Court: Well, the testimony shows that, shows it was November; even if it took 15 days, it would be.

Mr Hopkins: Well, we will agree to that, and it was used in 1909.

158 The Court: They do not want that.

Mr McKenzie: We don't know anything about it; neither do you.

The Court: You will have to give them a month to use it in 1908; you have not got any proof on that now.

Mr. McKenzie: Counsel admits this is the signature of Mr. Schott to this contract. I offer in evidence an order from W. H. Schott, addressed to the Universal Cement Company, dated August 3, 1908, for certain cement to be shipped prior to November 1, 1908, and ask leave to substitute a copy.

The Court: That contract that this man testified to?

Mr McKenzie: Yes.

Which said order, so offered and received in evidence, was in the words and figures following, to-wit:

9 UNIVERSAL PORTLAND CEMENT COMPANY'S
EX 1

Universal Por
land Cement
Company's
Exhibit 1.

Copy

Ack. 8-5-8

Sale ent.

BSS. 8-5-8

Printed in Copying Ink.

Universal Portland Cement Co.
Chicago—Pittsburg

Sale No.

Pro No.

Pur. Order No.

Chicago 8-3-8
(Date)

Enter Order for Account of W. H. Schott

Address American Trust Bldg., Chicago

Ship to Above
(Name)

Destination North Chicago, Ill.

Time of Shipment Prior to 11-1-8 as ord. later

Send Notice of Shipment to Pur.

Route.....
(Leave Blank)

Freight.....
(Leave Blank)

Switching.....
(Leave Blank)

F. O. B. Cars at North Chgo. Ill.

..... Barrels Universal Portland Cement, packed in
cloth

All Portland cement required to complete Pur's present
contract covering heating mains & tunnels for North Chgo
Naval Training School at North Chgo, Ill. approx. 5,000 B.

Price per barrel including package, \$1.40

#15939

F. E. E.

Subject to all the provisions on the back hereof.

Universal Port-
and Cement
Company's
Exhibit 1.

Not binding on Cement Company until accepted in writing.
Send Invoice to Pur.

O. K.

Signed (Signed) W. H. SCHOTT

F. B. (H)

For contract file in Sales Dept.

Smith.

Terms of Payment: Net cash in 30 days, or one (1) cent per barrel discount for cash in ten days from date of invoice. Payable in Chicago, New York or Pittsburg exchange.

If at any time the financial responsibility of purchaser becomes impaired or unsatisfactory to Cement Company, it reserves the right to require payments in advance or satisfactory security or guarantee that invoices will be promptly paid when due.

If purchaser fails to comply with terms of payment or with any of the other terms of sale, Cement Company reserves the right to cancel unfilled portion of any contract or order, purchaser remaining liable for all unpaid accounts.

Packages: Cloth Sacks to be paid for on same terms as cement. Cement Company will purchase empty cloth sacks bearing "Universal" brand from the original purchaser at ten cents (10c) each on their receipt at its Works in good condition, subject to its count and inspection. Empty sacks must be returned within 90 days to Universal Portland Cement Co., South Chicago, Ill., or Universal, Pa., freight prepaid and must be properly packed and so marked as to insure complete identification.

The Cement Company does not purchase worthless sacks or sacks of other brands than "Universal."

Shipments in paper bags are made at Purchaser's risk of breakage and resultant loss of cement.

Claims for loss or damage should be accompanied by freight bill with notation as to loss or damage signed by Railroad Agent.

Shipments: If Purchaser fails to take cement within the time agreed upon, Cement Company reserves the right to extend the time but shall not be obliged to do so.

The Purchaser shall give the Cement Company shipping instructions a reasonable time before shipments are to be made and the Cement Company shall not be responsible for delays in manufacturing or shipping cement caused by strikes, differences with workmen, accidents at its works, inability to secure cars, coal or other material, or other contingencies not under its control, nor for any delays in transportation.

specifications: The cement is to conform to Standard Specifications for Portland Cement, adopted by the American Society for Testing Materials with methods of testing recommended by the American Society of Civil Engineers.

Mr Hopkins: I want the court to know that these sacks,—that the last of them, were not returned until November 15, 1909.

The Court: They might be up there all summer. You can't tell anything about it.

Mr Hopkins: Well, they might have been there six months before they were used, you know.

The Court: They might have been there six months after.

Mr Hopkins: Yes, that is true.

Mr Peffers: Here is what I want to suggest to the Court: If they had all been dumped out the first of the year, they could have all been shipped back at once instead of the three different shipments that were made.

The Court: It isn't reasonable to suppose that they would keep sacks for one whole year.

Mr Hopkins: Their last shipment was made November 1908, and it isn't reasonable to suppose that if they were used before the Schott engineering company took charge, that they would hold those sacks one whole year because the last were returned November 15.

The Court: It is quite probable. Cement went up there, but they didn't use all of it in 1908.

The Witness: In a good many cases they never returned a sack.

Mr Hopkins: What is that?

A In a good many cases they never returned a sack.

The Court: That is a case we often have.

Mr McKenzie: I think that is all.

Cross-Examination by Mr. Hopkins.

Q Just wait a minute, I want to ask you just a few questions. You say you received \$502.70, July 31, 1909. Have you got any memorandum of that receipt in your books here?

A No sir.

Q You haven't?

A In the office.

Q What did you say?

Mr McKenzie: I think we have got them.

Mr Hopkins: Have you got the checks?

Testimony of
C J. Connell.

162 Mr McKenzie: The checks will go back, of course.

Mr Hopkins: What have you got?

Mr McKenzie: We have got the entry.

Mr Hopkins: What I want to get at is, do you know how that check was signed, that November check, of \$502.70?

A I couldnt say sir.

Q You couldnt say?

A No.

Q You dont know whether it was signed by the Schott Engineering Company or not, do you?

A Not at present, I can go to the records of the office and find out.

Mr Hopkins: Yes, I wish you would find out. I find also that on November 15, 1909, that another payment of \$815.00 was paid to you. Was that paid by check?

A I presume it was. I dont know now, until I Go to the office and find out.

Q Was that signed by the Schott Engineering Company?

A No sir.

Q What is that?

A No sir, I dont think it was. I think they were all.

Q Do you know anything about it?

A I seen the check at the time, I dont recall it now. My records would show that.

Q You don't recall that particular check?

A I dont recall that particular check.

Q Your records will show, but you dont know as yet 163 sit there now, dont remember?

A I can not recall it now.

Q Now, Mr. Connell, you remember in February, 1910 of getting a letter from Messrs. Pam & Hurd, regarding the action that should be taken by the creditors after the Schott Engineering Company had gone into bankruptcy?

A No sir, I do not, I did not see that.

Q What is that?

A I did not see that letter. It was probably handled through the legal department.

Q When through your legal department?

A Yes sir.

Q Have you got the reply that was made?

A No sir.

Q Do you know where it is?

A No sir, dont remember of seeing any.

Q Dont remember of seeing any?

A No sir. I didnt see it come into the office.

Q It wouldnt come under your department then?

A Practically no; if I would get it first handed, then of

course I would turn it over and transfer it to somebody else.

Q But as to the character of that answer, if one was made, you dont know about it?

A I dont know, no sir.

Q Who was the treasurer of your company?

A Mr. F. J. Hyman.

Mr. Hopkins: This is a copy, isnt it?

Mr Peffers: Here is the original.

164 Mr Hopkins: Is that the signature of Mr. Hyman, your treasurer?

A Yes sir.

Q That is the affidavit then, is it?

A Yes sir.

Q And who is that notary public?

A Rolewitz. He is over in the office there.

Q In your office?

A He is in with Knapp and Campbell.

Mr Hopkins: I will read from this—this affidavit is the usual form, if your Honor please, and states this:

“That the claim is for goods and materials sold and delivered to said W. H. Schott on his special order and request, as more fully appears from the itemized statement of account hereto annexed and made a part hereof, said goods being furnished at the Naval Training station, at North Chicago, Lake County, state of Illinois”—Reading)

The Court: Have you got a copy there?

Mr. Hopkins: Yes sir.

The Court: Put a copy in place of it.

Mr Hopkins: I will put the copy in place of the original.

Mr. Peffers: Except the itemized statement. We will attach that to it as introduced in evidence.

Mr. Hopkins: Mark that as our exhibit.

Whereupon document was marked “defendant’s exhibit 40,” and the same is as follows:

Defendant's
Exhibit 38.

165

DEFENDANT'S EX 38.

Proof of Debt Due Corporation.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the Matter of
Schott Engineering Company, } In Bankruptcy.
Bankrupt. } No. 17328.

United States of America,
Northern District of Illinois } ss.
State of Illinois,
County of Cook }

At Chicago, in said Northern district of Illinois, on the 8th day of July, A. D. 1910, came T. J. Hyman, of Chicago in the county of Cook, and State of Illinois, and made oath and says that he is (1) Treasurer of the Universal Portland Cement Company, a corporation incorporated by and under the laws of the State of Indiana, and carrying on business at Chicago in the county of Cook and State of Illinois, and that he is duly authorized to make this proof, and says that the said Schott Engineering Company, the person (2) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of One thousand dollars and cents with interest from Oct. 23, 1908, at 5 per cent. per annum; that the consideration of said debt is as follows: for goods and material sold and delivered to said W. H. Schott at his special order and request as more fully appears from the itemized statement of said account hereto annexed and made a part hereof said goods being furnished at the U. S. Naval Station at N. Chicago, Lake County, State of Illinois; the Schott Engineering Co. assumed and agreed to pay the liabilities of W. H. Schott for said goods for a valuable consideration; that no part of said debt has been paid; except that \$3014.29 has been paid on said account, leaving a bal-

ce of \$1000.00 and interest thereon, as aforesaid, and as
ore fully appears from said account hereto attached; that
ere are no set-offs or counterclaims to the same (4) that
id debt (5) became due on the 23rd day of October A. D.
08, and is evidenced and set forth in the statement of ac-
ount of W. H. Schott to Universal Portland Cement Com-
any hereto attached, marked "Exhibit A" and made a part
ereof.

That said debt consists of an open account of (6) several
ems maturing at (7) different dates; that the (8) average
ne date thereof is October 23, 1908, that no note has been re-
eived for such account, nor any judgment rendered thereon,
nd that said corporation has not, nor has any person by its
rder, or to the knowledge or belief of said deponent, for its
se, had or received any manner of security for said debt
hatever.

T. J. HYMAN

Treasurer of said Corporation.

Subscribed and Sworn to before me, this 8 day of July,
A. D. 1910.

NICHOLAS F. RELEWITZ

Notary Public.

[Official Character]

- (1.) If there is a treasurer, the deposition should be made by
him; see Order XXI.
- (2.) If a Voluntary Bankrupt, insert the word "by." If In-
voluntary the word "against."
- (3.) If payments have been made, insert the word "except,"
followed by a statement of the payments.
- (4.) If there are set-offs, etc., insert the word "except," fol-
lowed by a statement of the set-offs, etc.
- (5.) Insert here the word "became" or "will become."

Exhibit "A." 166

EXHIBIT "A".

Chicago, Ill. July 8—1910.

W. T. Schott
 American Trust Bldg., City
 to Universal Portland Cement Co., Dr.

1908			
Aug.	8—30	Cement	585.73
"	8—30		292.87
"	7—30		292.87
"	7—30		292.87 1464.34
Sept.	11—30		292.87
"	11—30		292.87
"	15—30		216.47
"	15—30		292.87
"	16—30		292.87 1387.95
Nov.	7—30		518.00
"	9—30		644.00 1162.00
			<hr/>
			4014.29

Credits.

1908			
Oct. 30	Cash on %		1004.34
Nov. 17	Sax returned		220.00
Dec. 23	"		322.80
1909			
Jan. 12	"		149.40
July 31	"		502.70
Nov. 15	"		815.05 3014.29
			<hr/>
			1000.00

167 Mr Hopkins: I wish you would produce the letter from Pam and Hurd that was received by your company, and your reply. Will you? I would like to have you look that up and bring it into court in the morning.

Mr McKenzie: Just a minute. Did you know that any such letter was received?

A I don't know that any such letter was received.

Q Do you know whether any such reply was ever written?

A No special reply that I know of.

Mr Hopkins: If your Honor please, the reason that I make
that statement—

The Court: Is your office here in Chicago?

A Yes sir.

The Court: You find out about that.

Mr. McKenzie: I can tell you. We received such a letter,
but no reply was made. Now, the same letter you have in-
troduced in evidence, I will admit we received that same let-
ter.

Mr Hopkins: Well, I think you made a reply.

Mr McKenzie: No, no reply was made.

Mr Hopkins: That doesn't correspond with what Judge
Pam says. Judge Pam said that—

Mr McKenzie: I object to what Judge Pam says.

Mr Hopkins: Well, I think it is competent, and the rea-
son that I think this company made a reply, is that Judge

Pam in open court made the statement that there were
168 forty-one of the creditors that approved, and only two
disapproved, and that the approving creditors aggre-
gated over forty-five thousand dollars, and the disapproving,
the two disapproving, their aggregate claims only amounted
to a very small sum.

Mr McKenzie: Well, I object to the statement, and move
to strike it out.

Mr Hopkins: That was the statement made by Judge Pam.

The Court: This won't be evidence.

Mr Hopkins: After that statement was made by Mr. Pam,
the judge directed that an order be made by which the build-
ing be completed by the trustee of the receiver, or receiver
of the Schott Engineering Company. Now, I think in view
of that statement that this gentlemen should make a search,
and that they did make a reply.

Mr McKenzie: Do you want to swear me?

Mr Hopkins: I don't want to do that.

Mr McKenzie: Mr. Church and I have made a search, and
we have been unable to find any such reply. We have such
a letter, and it is identical with the letter you have intro-
duced in evidence.

Mr Church: The officers have said there was no answer
to that letter, stated to me those letters were ignored.

Mr Hopkins: I would like to have Mr. Connell,—he is
a member of that firm, I would like to have him make a
169 search for that. I would like to have his statement that
he didn't make a reply to that.

Testimony of
C. J. Connell.

The Witness: I will state that very readily, because I wouldn't make a reply; I wouldn't make a reply to it if I received the letter.

Q Why?

A Probably turned it over to the legal department.

Q Who is your legal department?

A Knapp & Campbell.

The Court: They ought to know about it.

Mr McKenzie: They know about it.

A I know very well I wouldn't put my foot in it.

The Court: There is no showing here that the witness made any such reply.

Mr Hopkins: No, in view of that statement.

They Court: They say they have made a search.

Mr Hopkins: Now, it goes into the record that they received the notice.

The Court: Yes, they received the letter, the circular letter was received by this Universal Portland Cement Company.

170 Mr McKenzie: I wish to offer a certified copy of a letter from Beckman Winthrop, Assistant Secretary to the Commandant of the United States Naval Training Station, Great Lakes, North Chicago, Illinois, dated February 6, 1911.

Mr Hopkins: What is the object? What do you want?

Mr Peffers: That is to show their theory, the date of the settlement was February 6, instead of the time of the year—

Mr Hopkins: That don't settle anything.

Mr McKenzie: It gets everything before the Court, that is all. It proves both our cases.

Mr Peffers: Yes, I think it is as much in our favor as it is in yours.

Mr Hopkins: But I don't think it is competent, unless the court—I don't think it makes much difference, one way or the other.

The Court: Well, it may be received. Does it show the same date proved?

Mr McKenzie: It shows February 6, 1911.

The Court: Yes, the same date

Mr Peffers: It shows that five per cent is to be retained for a year.

The Court: All right.

Mr McKenzie: That will be plaintiff's exhibit 5.

Whereupon said document, so offered and received in evidence was marked plaintiff's exhibit 5, and is in the words and figures following, to-wit:—

Plaintiff's
Exhibit 5.

P EX 5
Copy

545-10

February 6, 1911.

With reference to the contract of July 30, 1908, with Mr. H. Schott for installing electrical and heating distribution mains and concrete tunnel at the station under your command, the Department desires that you submit a voucher for payment of the remainder of the contract price, less the five per cent reservation to be retained for a year from the date of completion of the work, and less also a deduction of \$14.75 covering the cost of inspection paid from the appropriation "Naval training station, Great Lakes (Maintenance)" for the period from July 30, 1909, to October 1, 1910.

This matter will be expedited as much as possible, as it is desired that payment be made by the 16th instant.

Very respectfully,

BEEKMAN WINTHROP,

Assistant Secretary.

The Commandant,
U. S. Naval Training Station,
Great Lakes, North Chicago, Ill.

72 Mr McKenzie: It is a quarter after 5:00, and I think we ought to have until the morning to decide whether we rest or not.

The Court: All right, I think that is proper.

Whereupon an adjournment was taken until the 22nd day of May, A. D. 1913, at the hour of ten o'clock A. M.

May 22, 1913, 10:00 o'clock A. M., hearing resumed pursuant to adjournment.

Mr McKenzie: I wish at this time the record to show that William H. Schott personally scheduled an indebtedness of the Universal Portland Cement Company for one thousand dollars, and that the Universal Portland Cement Company filed a claim against W. A. Schott personally for one thousand dollars:

Adavit of T.
J. Hyman.

Said claim being in the words and figures following, to wit:—

173 PROOF OF DEBT DUE CORPORATION.

IN THE DISTRICT COURT OF THE UNITED STATES,
For the Northern District of Illinois,
Eastern Division.

In the Matter of
W. H. Schott, } In Bankruptcy.
Bankrupt. } No. 17551.

United States of America,
Northern District of Illinois,
State of Illinois,
County of Cook. } ss.

At Chicago, in said Northern district of Illinois, on the 8th day of July, A. D. 1910, came T. J. Hyman, of Chicago in the county of Cook, and State of Illinois, and made oath and says that he is (1) Treasurer of the Universal Portland Cement Co., a corporation incorporated by, and under the laws of the State of Indiana, and carrying on business at Chicago in the county of Cook and State of Illinois, and that he is duly authorized to make this proof, and says that the said W. H. Schott, the person (2) by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of One thousand dollars and no cents with interest from October 23, 1908, at five per cent. per annum; that the consideration of said debt is as follows: for goods and materials sold and delivered to the said W. H. Schott at his special order and request as more fully appears from the itemized statement of account hereto annexed and made a part hereof, said goods being furnished at the U. S. Naval Station at N. Chicago, in Lake County, Illinois; that

no part of said debt has been paid (3) except that \$3014.29 has been paid on said account leaving a balance of \$1000 and interest thereon as aforesaid, and as more fully appears from said account hereto attached that there are no set-offs or counterclaims to the same (4) none that said debt (5) became due on the 23rd day of October, A. D. 1908, and is evidenced and set forth in the statement of account of W. H. Schott to Universal Portland Cement Co. hereto attached, marked "Exhibit A" and made a part hereof.

That said debt consists of an open account of (6) several items maturing at (7) different dates; that the (8) average due date thereof is October 23, 1908; that no note has been received for such account, nor any judgment rendered thereon, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

T. J. HYMAN,

Treasurer of said Corporation.

Subscribed and Sworn to before me, this 8th day of July,
A. D. 19.....

NICHOLAS F. RELEWITZ,

Notary Public.

[Official Character.]

- (1.) If there is a treasurer, the deposition should be made by him; see Order XXI.
 - (2.) If a Voluntary Bankrupt, insert the word "by." If Involuntary the word "against."
 - (3.) If payments have been made, insert the word "except," followed by a statement of the payments.
 - (4.) If there are set-offs, etc., insert the word "except," followed by a statement of the set-offs, etc.
 - (5.) Insert here the word "became" or "will become."
- (Endorsed) ly 8-1910 3.00 Frank L. Wean Referee in Bankruptcy.

Exhibit "A."

174

EXHIBIT "A."

Chicago, Ill.
July 8—1910

W. H. Schott

American Trust Bldg., City
To Universal Portland Cement Co., Dr.
1908

Aug.	8—30	Cement	585.73	
"	8—30		292.87	
"	7—30		292.87	
"	7—30		292.87	1464.33
Sept.	11—30		292.87	
"	11—30		292.87	
"	15—30		216.47	
"	15—30		292.87	
"	16—30		292.87	1387.93
Nov.	7—30		518.00	
"	9—30		644.00	1162.00
				<hr/>
				4014.23

Credits.

1908				
Oct.	30	Cash on %	1004.34	
Nov.	17	Sax returned	220.00	
Dec.	23	"	322.80	
1909				
Jan.	12,	"	149.40	
July	31,	"	502.70	
Nov.	15,	"	815.05	3014.29
				<hr/>
				1000.00

175 Mr. McKenzie: That is all on these two claims.
The Court: Proceed with the next claim.

Mr. Wyeth: The next claim is that of the Standard Underground Cable Company.

W. M. ROGERS called as a witness on behalf of the use plaintiffs, being first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Q State your name?

A W. M. Rogers.

Q Where do you reside?

A 1938 Farwell avenue, Rogers Park.

Q Chicago?

A Yes sir.

Mr. Hopkins: What claim is this?

Mr. Wyeth: Standard Underground Cable Company.

Q What relation do you sustain to the Standard Underground Cable Company, if any?

A Chief Clerk to the Chicago office.

Q Do you know W. H. Schott, and the Schott Engineering Company?

A Yes, I do.

Q How long have you been with the Standard Underground Cable Company?

A Thirteen years.

Q How many?

A Thirteen years.

Q Did your Standard Underground Cable Company have some transactions relating to furnishing materials for what is ordinarily called the Schott job, at North Chicago, at the Naval Training Station?

A Yes sir.

176 Q I show you a paper here dated August 20, 1908, which purports to be an order signed by W. H. Schott and I ask you whether your company received that on or about its date?

Mr. Hopkins: What is that date?

Mr. Wyeth: August 20th, 1908.

Q What do you say?

A I recognize it as the order received from them.

Q And do you know whether your company sent that order, by shipping?

A Yes sir.

Q Have you the shipping receipt there?

A We have the bill of lading.

Q The bill of lading?

Testimony of
W. M. Rogers.

A Which shows the shipment.

Q What time was the order filled, so far as shipment was concerned?

A Under date of November 5, 1908.

Q A little louder?

A Under date of November 5, 1908.

Q To whom was it shipped?

A It was shipped to W. H. Schott, care of United States Naval Training Station, North Chicago, Illinois.

Mr. Wyeth: Here is the order, and I will ask that be marked Standard Underground Exhibit 1.

Mr. Hopkins: All subject to the understanding we had of all of these matters.

Mr. Wyeth: We offer the order marked as stated, Standard Underground Exhibit 1.

The said document was marked "Standard Underground Exhibit 1, A. D. P.", and is in the words and figures following to-wit:

Standard Under-
ground
Exhibit 1.

177 STANDARD UNDERGROUND EXHIBIT 1.

W. H. Schott
1100-1126 American Trust Building
Chicago

Chicago, August 20, 1908.

Requisition No. 3861

Messrs. Standard Underground Cable Co.

Address: The Rookery Bldg., Chicago

Please ship to W. H. Schott, North Chicago, Ill. Care of U. S. Naval Training Station, Via Deliver to C. & N. W. Ry.

The list of material hereto attached.

W. H. SCHOTT
By M. O. PAYN

Note

Deliver no invoices to employees. Mail same to 1100 American Trust Building, with bill of lading. Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice. Will not pay for boxing, packing or cartage. Goods not shipped check "O" and ask instructions. Make no back orders.

PRIMARY, 2300 VOLT CABLES.

Standard Underground Exhibit 1.

4,950 ft. 3 cond. #4 B&SG solid, each cond. insulated with 3/32" paper, 2/32" paper over the bunch, 3/32" plain lead,.....@	22.8¢ per ft.
1,515 ft. 3 cond. #10 B&SG solid, ditto, @.....	13.0¢ per ft.
1,140 ft. 3 cond. #8 B&SG solid, ditto, @.....	14.8¢ per ft.
1,080 ft. 3 cond. #6 B&SG solid, ditto, @.....	18.5¢ per ft.
250 ft. 2 cond. #8 B&SG ditto, @.....	12.5¢ per ft.
1,200 ft. 2 cond. #10 B&SG solid, ditto, @.....	10.8¢ per ft.

SECONDARY, 250 VOLT CABLES.

500 ft. 3 cond. #8 B&SG solid, each conductor insulated with 2/32" paper, 1/64" paper over the bunch, 3/32" plain lead, @.....	12.1¢ per ft.
1,040 ft. 3 cond. #6 B&SG solid, ditto, @.....	15.4¢ per ft.
1,495 ft. 3 cond. #4 B&SG solid, ditto, @.....	19.3¢ per ft.
380 ft. 2 cond. #6 B&SG solid, ditto, @.....	14.1¢ per ft.
40 ft. 2 cond. #8 B&SG solid, ditto, @.....	12.1¢ per ft.
124 ft. 3 cond. #3 B&SG solid, each cond. insulated with 2/32" paper, 1/32" paper over the bunch, 3/32" plain lead, @.....	22.5¢ per ft.
250 ft. 3 cond. #400,000 CM stranded, ditto,.....	94.8¢ per ft.
310 ft. 3 cond. #1/0 B&SG stranded, ditto,.....	34.7¢ per ft.
505 ft. 3 cond. #2/0 B&SG stranded, ditto,.....	40.4¢ per ft.
210 ft. 3 cond. 3 3/0 B&SG stranded, ditto,.....	47.6¢ per ft.
60 ft. 3 cond. #1 B&SG solid, ditto,.....	29.9¢ per ft.
450 ft. 3 cond. #2 B&SG solid, ditto,.....	25.7¢ per ft.
1,350 ft. 2 cond. #2/0 B&SG stranded, ditto,.....	34.7¢ per ft.
14,900 ft. 2 cond. #8 B&SG solid, each cond. insulated with 3/32" paper, 3/64" paper over the bunch, 3/32" plain lead,.....	12.1¢ per ft.
14,000 ft. #12 B&SG solid, single cond. varnished cloth insulation for 110 volts, double braided, @.....	\$16.00 per ft.

179 Cable Tests.

Factory Tests.

203. Primary Cables. Before shipment all lead-covered primary wires and cable shall be given the following tests; contractor to furnish all laboe, power, instruments, observers, etc., required, but tests shall be under the supervision and direction of the officer in charge.

210. Breakdown Test: 6,250 volts alternating current for five minutes.

211. Insulation Resistance: Insulation resistance between one conductor and other conductors, and sheath shall be at least 50 megohms per mile. Insulation resistance to be measured after breakdown test and by voltmeter method.

212 Secondary Cables. Breakdown test shall be 1,250 volts alternating current for five minutes.

213. Insulation resistance to be at least 25 megohms per mile.

214. Rubber Covered, Braided Wire: All rubber-covered, braided wire and cables shall conform to test requirements prescribed by National Electric Code.

Tests After Installation.

215. After installation, and before transformers are connected, all primary conductors shall be given a breakdown test of 5,000 volts for five minutes between conductors, and 5,000 volts for five minutes between conductors and sheath, or conduit.

216. All secondary circuits shall be given a breakdown test of 1,000 volts for five minutes between conductors, and 1,000 volts for five minutes between conductors and sheath, or conduit.

180 Mr. Wyeth: Q I show you a paper here and ask you to state whether or not that is a ledger statement of the account respecting that order and shipment?

Mr. Hopkins: What is that, what is that question?

Mr. Wyeth: A ledger statement of account.

A This is a ledger statement of the account as it now stands.

Q Now, the amount of that shipment shown there is in two parts, isn't it? How much is it?

A The total was \$6,713.09.

Q Yes. Now, were there any credits with respect to that amount, or on that shipment, that you know of?

A There were credits issued December 24, \$3.66, and \$4.67, on account of freight.

Q Yes.

A And the cash remittance of \$3,000.00.

Q What date was the \$3,000.00 paid?

A That was December 28th; that was December 28th.

Q 1908?

A 1908, yes sir, and again on November 19, 1909.

Q Yes.

A Cash.

Q How much?

A Cash remittance, \$1,000.00.

Q That left, on and after November 19th, 1909, how much owing on that bill?

A That leaves a balance of \$2,563.16.

Q Has that ever been paid?

A Well—

Q What?

A By the way, there is another. Do you mean there, Mr. Wyeth?

181 Q Is there? Is it on there?

A It is on there, yes.

Q Beg pardon.

A On there (indicating).

Q Oh, yes.

A January 19th.

Q Is there any further credit on that?

A January 19, 1910; there was \$141.60, on account of reels returned.

Q Reels?

A Yes sir.

Q What was this material?

A It was electric light power cables for use.

Q A little louder?

A Electric light power cables for use for carrying electric current.

Q Giving credit for that also, what was the balance after that credit was given?

A That left a balance due of \$2,563.16.

Q And at what date was the last credit there?

A The last credit was the real credit, January 19, 1910.

Q Has there any part of that ever been paid of the balance there?

A No part of that has been paid, according to our understanding.

Mr. Wyeth: Now, I will offer for convenience, this invoice or ledger statement. Is there any objection to it? It is a mere matter of figures.

Mr. Peffers: That is all?

Mr. Hopkins: Step here a minute please. Have your witness come here.

Mr. Wyeth: Come down here, Mr. Rogers.

(Counsel and the witness confer privately.)

Mr. Hopkins: That is all right.

182 Mr. Wyeth: We offer this ledger statement as Underground Standard Exhibit 2.

Mr. Hopkins: Subject to the general objections that we have made, you know. We are not requiring them to produce the books.

Which said document, marked "Standard Underground Exhibit 2" is in the words and figures following to-wit:

Standard Under-
ground
Exhibit 2.

183 STANDARD UNDERGROUND EXHIBIT 2.

Statement.

Standard Underground Cable Co.

Pittsburgh Pa. June 30, 1912.

In account with

W. H. Schott,

100 American Trust Bldg., Chicago, Ills.

Sales Agency C

Acct. Letter S. No. 291.

Dr. 19.08 #

Nov. 5, Mdse.

6,474.68

6, "

238.41

6,713.09

Cr. 19.08 #

Dec. 24,

3.66

24,

4.67

24,

3,000.00

Cr. 19.09 #

Nov. 19, Cash,

1,000.00

Cr. 19.10 #

Jan. 19,

141.60

4,149.93

2,563.16

184 Mr. Wyeth: Now, Mr. Rogers, I will show you another paper, purporting to be an order. What is the date of that?

A This is November—dated November 15, 1909.

Q Did your company receive that order?

A Yes sir, this is the original order.

Q And did they fill that order?

A Yes sir.

Q For what material was that, speaking generally?

A It was for some electric light and power cables for transmitting electric current.

Q Do you know the time that it was shipped, and to whom?

A December 11, 1909, consigned to W. H. Schott, care of Naval Station, North Chicago, Illinois.

Mr. Wyeth: I will show you what purports to be a ledger statement again and ask you whether or not that is a ledger statement relating to that account last mentioned? Hold that order.

A Yes sir.

Q How much was the price of the shipment, what was the price and value of the shipment?

A \$199.54

Q And what credits were there, if any, on it?

A December 30, 1909, freight \$12.00.

Q That left a balance of how much at that time?

A \$187.54.

Q Has that been paid?

A It has not.

Mr. Wyeth: We will offer this second order, which is dated November 15, 1909.

Mr. Peffers: What is the number.

Mr. Wyeth: Requisition number 4634, and signed by Schott Engineering Company, by Payne. I will ask that be marked Standard Underground Exhibit 3.

Mr. Hopkins: It is under the date of November 15, 1909?

Mr. Wyeth: Yes. Mark that, will you.

(The document was marked as requested.)

Mr. Wyeth: And also the ledger statement. Mark that ledger statement as Standard Underground Exhibit 4.

(The document was marked as requested.)

Which said Standard Underground Exhibit 3 is in the word and figures following, to-wit:

86 "STANDARD UNDERGROUND CABLE COMPANY
EXHIBIT THREE (3).

Standard Un-
derground
Exhibit 3.

The Schott Engineering Company
315 Dearborn street, Chicago.

Chicago, Nov. 15, 1909.

Requisition No. 4634.

Messrs. Standard Underground Cable Co.,

Address, Chicago.

Please ship to W. H. Schott—North Chicago, Ill.

Care Naval Station.

Via C. & N. W. Ry. Rush. At once.

100 ft of 2300 V-1 Con. #8 B. & S. G. Solid 5/32" proper insulation, 3/32" plain lead.

120 ft. of 2300 V-1 Con. #10 B. & S. G. Solid 5/32" proper insulation, 3/32" plain lead.

55 ft. of 2300 V. 1 Con. 400,000 C. M. Standard 5/64 proper insulation, 5/64" proper insulation 3/32" plain lead.

55 ft. of 230 V. 1 Con. #000 B. & S. G. Stranded 5/64 proper insulation 3/32" plain lead.

230 ft. of 230 V 1 Con #00 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.

Standard Under-
ground
Exhibit 3.

30 ft. of 230 C 1 Con #1 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.
60 ft. of 230 V 1 Con #2 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.
30 ft. of 230 V 1 Con #3 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.
150 ft. of 230 V 1 Con #4 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.
160 ft. of 230 V 1 Con #6 B. & S. G. Stranded 5/54" proper insulation 3/32" plain lead.
70 ft. of 230 V 1 Con #8 B. & S. G. Stranded 5/64" proper insulation 3/32" plain lead.

THE SCHOTT ENGINEERING COMPANY.

By PAYNE

(Note) Deliver no invoices to employes. Mail to 315 Dearborn street with bill of lading. Will not be responsible for goods delivered without requisition. Will not pay for boxing, packing or cartage. Goods not shipped check "O" and ask instructions. Make no back orders."

187 Mr. Wyeth: Mark that ledger statement as Standard Underground exhibit 4.

(Document marked as requested.)

Which said Standard Underground Exhibit 4 is in the words and figures following, to-wit:

Standard Under-
ground
Exhibit 4.

188 STANDARD UNDERGROUND EX. 4.

Statement

Standard Underground Cable Co. •

Pittsburgh Pa., June 30, 1911.

The Schott Engineering Co.,

Chicago, Ills.

Sales Agency C.

Acct. Letter S, No. 409.

Dr. 19.09 #

Dec. 11, Mdse,

199.54

Cr. 19.09 #

Dec. 30 Frt.

12.00

187.54

89 Mr Wyeth: Mr. Rogers, have you computed the interest on these several amounts, at 5 per cent. from August 6, 1911 to date?

A Yes sir.

Q Now, on the first account there, where there was some larger amount due, \$2300 and some odd dollars, I think, what was the interest on that?

A \$224.27.

Q Making a total amount on that part of the account how much? What was the total of that? Some \$2563.16, with the interest added, how much would it be?

A \$2787.43.

Q And the second amount, where the balance was \$189.54, did you likewise—did you compute the interest at the same rate, and the same time on that?

A Yes sir.

Q What was the interest?

A \$16.40.

Q Making a total for that part of the claim how much?

A \$203.94.

Q How much do the total claims amount to, with interest?

A \$2991.37.

Mr Wyeth: I suppose that you admit this was used on this contract by Schott?

Mr Hopkins: By the Schott Engineering Company.

Mr Wyeth: By the Schott Engineering Company. All right.

Mr Peffers: Give us the circular, will you?

Mr Hopkins: Is that all?

The Court: Some of this material was furnished before the first of January?

Mr Hopkins: Oh, yes, some was furnished before the 1st of January.

190 The Court: Yes.

Mr Wyeth: That was used by Schott, I suppose.

Mr Hopkins: No it was used by the Schott Engineering Company.

Mr Wyeth: Well Wait: Now, About that admission. Now you admit it was all used on this job.

Mr Peffers: How much is that?

Mr Hopkins: There is not anything to show, you see.

Mr Wyeth: What do you want, this shipment?

Mr Hopkins: I did not get the date of shipment.

2
7
4
testimony of
V. M. Rogers.

Mr Peffers: We haven't got enough there to show when it got there. When did it get there?

Mr Wyeth: I wasn't up there, and I can't say. I suppose it got there in November.

Mr Hopkins: I don't know whether it got there in November or December, 1908, but it wasn't used by Mr. Schott. It was used by the Schott Engineering Company.

Mr Wyeth: Well, that we don't admit.

The Court: They are the ones to do the admitting, as I understand it.

Mr Hopkins: Yes.

The Court: You want them to admit something.

Mr Hopkins: Yes, they want us to admit something.

The Court: They admit whatever they think is proper, of course.

Mr. Wyeth: Well, they will admit this, that all of this material was used there either by Schott, or if it wasn't used in due course by January 1, 1909, why it was used from 191 thence on by the engineering company?

Mr Hopkins: The date o these shipments show that it could not be used by Schott.

Mr Wyeth: Well, that is a statement of yours.

Mr Peffers: Well, it came from Pittsburg—

Mr Wyeth: Yes.

Mr Peffers: —or Connecticut, I have forgotten which. It would take three weeks to get there.

Mr Wyeth: I don't know about that.

Mr Peffers: Two weeks.

Mr Wyeth: I don't know.

Mr Peffers: If you don't know, you do know that it takes two or three weeks, don't you, to get a shipment by freight?

Mr Hopkins: We will make the admission that I have stated, and if he don't want it, why, he can make the proof.

Mr Wyeth: What is your admission?

The Court: It would be possible to prove it, I suppose.

Mr Hopkins: My admission is, that this material was received and used by the Schott Engineering Company in that building up there.

Mr Wyeth: And all of it was used by them, is all you are willing to admit?

Mr Hopkins: That is true, because it did not get there in time to be used by Schott.

192 Mr Wyeth: We have the admission, so far as it goes, with the privilege of making any further showing?

The Court: Yes.

Mr Hopkins: Why, yes, I have no objection to that.

The Court: All right. Very likely that is true, it would not get there very much before the 1st of January.

Mr Hopkins: What is that?

The Court: It could not have gotten on the job before January, very well.

Mr Hopkins: No.

The Court: Possibly not.

Mr Wyeth: That is all.

Cross-Examination by Mr. Hopkins.

Q Let us see,—what is your name?

A W. M. Rogers.

Mr Peffers: Senator, just a minute, I want to ask for that circular letter.

Mr Hopkins: Q Mr. Rogers, what is your position with the Standard Underground Cable Company?

A Chief Clerk in the Chicago office.

Q And how long have you held that position?

A 13 years.

Q I notice here on November 19, or rather November 19th, cash, that is, November 19, 1909,—that is 1909 isn't it, 193 there (indicating)

Mr Wyeth: That payment was made pretty nearly a year after this shipment here, that second one.

Mr. Hopkins: Yes

Q \$1,000.00. That was a check sent to you by the Schott Engineering Company, was it not?

A Yes, sir.

Q And received and credited on this account?

A Yes, sir.

Q Yes. And on January 19, 1910, is there another credit of \$141.60?

A That is on account of reels returned; that is not cash.

Q That was given credit, the same as the \$1,000.00?

A Yes.

Q Now, these orders that have been offered in evidence here, that is a Schott Engineering Company order is it not (indicating)?

A That one was Schott Engineering Company.

Q Yes.

A Yes, sir.

Testimony of
W. M. Rogers.

Q Now, I will ask you if you received the circular letter from the Receiver of the Schott Engineering Company, the Central Trust Company, if you received that letter that is produced here by your attorney as being received by you?

A Well, I cannot answer that question without referring to the records.

Mr. Wyeth: We admit that we received—

A I am not positive.

Mr. Wyeth: —it, that the Standard Underground
194 Cable Company received the circular letter sent out by the Receiver of the Schott Engineering Company. I don't know who knows personally about it.

The Witness: I personally handled that part of it, but I could not vouch for it without looking over the records.

Mr. Hopkins: All right.

Mr. Peffers: Who was it received by, Senator?

Mr. Hopkins: Q Do you know who received the letter? Did you receive it at your office?

Mr. Peffers: At the Chicago Branch?

A Is that directed to Chicago, or Pittsburg?

Mr. Wyeth: It is not directed.

The Witness: Not marked?

Mr. Hopkins: It does not indicate.

The Court: Mr. Wyeth admits it, doesn't he?

Mr. Hopkins: What is that?

The Court: Mr. Wyeth admits, doesn't he, that they got it?

Mr. Wyeth: We admit that the Standard Underground received it in the due course of mail.

Mr. Hopkins: They admit that.

Mr. Wyeth: Within a few days after its date.

Mr. Hopkins: Now, produce the reply.

Mr. Wyeth: We never made one.

Mr. Hopkins: How do you know you did not?

Mr. Wyeth: We did not reply.

Mr. Hopkins: You did not reply?

195 Mr Wyeth: No, sir. I guess Mr. Peffers will agree that we did not.

Mr Hopkins: If you and he have agreed to that, I won't go any further on it.

Q Look at that letter under date of November 8, 1909, on the letter head of the Schott Engineering Company, and signed by W. H. Schott, president, and state if that is a

letter that was received by your company? It is produced by your attorney. Testimony of
W. M. Rogers

A I am in exactly in the same position on that. I presume it was, but I couldnt positively vouch for it at all without referring to the records.

Q You have no doubt about it, have you?

A I have no doubt but what it was received.

Q I will ask you to look at that and state if that is not a reply?

A That was produced by Mr. Wyeth?

Q Yes, that is produced by your attorney also.

A Yes, sir, I can identy that as being my own.

Q Your company's letter?

A Yes, sir.

Mr Wyeth: Have that marked.

Mr Hopkins: Yes, mark this defendant's exhibit 31.

(The document was marked as requested.)

Mr Hopkins: Exhibit 31 is a letter dated November 1909. Mark this exhibit 32.

(The document was marked as requested.)

196 Mr. Hopkins: Exhibit 32 is dated November 10, 1909, two sheets.

Mr. Wyeth: May I see them before you offer them?

Mr. Hopkins: Yes.

Mr. Wyeth: Or are you going to offer them?

Mr. Hopkins: Yes, we are going to offer them in connection with his testimony.

Mr. Wyeth: Well, we think they are immaterial, and we object on that ground.

Mr. Hopkins: I will read exhibit 31, dated November 8, 1909.

Thereupon said letters last above referred to were offered and received in evidence and marked Defendant exhibits 31 and 32, and the same are in the words and figures following, to-wit:

Defendant's
Exhibit 31.

197

(DEFENDANT'S EXHIBIT 31)

Office of
The Schott Engineering Company,
Chicago, Ill. November 8th, 1909.
(Defendants' Exhibit 31).

Standard Underground Cable Co.,
The Rookery,
Chicago.

Gentlemen:—

Replying to your esteemed favor of November 6th, will say
somewheres round the 20th, we will make you a substantial
remittance on account of the cable furnished for the Gov-
ernment work. We are just at this moment pulling this
cable.

We have been held up on this job very much more than
we anticipated nad on account of this, we have been unable
to make you the remittance we expected to. When the proper
reduction is made for the reels, which will be shipped back
to you promptly, there will be only \$3,000 of the account, but
we will make a substantial remittance of this amount this
month and will send you the balance next month.

Trusting this will be satisfactory, we beg to remain

Yours very truly,

(Signed) W. H. SCHOTT,
President

WHS—C

Defendant's
Exhibit 32.

198 (Copy)

(DEF. EX 32).

Standard Underground Cable Co.,
Westinghouse Building,
Pittsburgh, Pa., Nov. 10, 1909.

W. H. Schott, Esq.,
c/o Schott Engineering Co.,
315 Dearborn Street,
Chicago, Ill.

Dear Sir:—

We are just now in receipt of your letter of the 8th in-
stant, forwarded to us by Mr. Wiley, and note that you will
send us a substantial remittance on our account on the 20th
of the present month, and that whatever balance is owing to

after such substantial remittance is received, will come forward during December.

You will, of course, understand that in conducting the financial affairs of our Company, we greatly rely on our terms being complied with, and when this is not done, as in your case, it upsets our plans. Whenever we render our good customers assistance, it becomes necessary to have our accounts satisfactorily secured, and a definite date for payment named. In your case we have not even had this, but in our desire to aid you to the greatest extent possible, and realizing your need of assistance, we have on our own account, and on the personal solicitation of our Mr. Wiley, carried your account on our books for over one year, and when one 199 realizes that our terms are thirty (30) days from date of shipment, it becomes somewhat of a hardship for us to carry an account for over 365 days. It is true that interest charges at 6% per annum have accumulated, but in view of our need of money, it is the principal we are so badly in need of.

We therefore, must ask you to help us, by not failing to remit us \$2,000.00 in cash on the 20th of Nov., and on the same date forward us your note for the balance, such note to be dated Nov. 20th at thirty (30) days. The interest on the note and account to be adjusted in cash.

We hope you are proceeding successfully with the affairs of the Schott Engineering Company, and assure you that you and your Company have at all times our best wishes for success.

Very truly yours,

STANDARD UNDERGROUND CABLE CO.

(Sgd.) Per J. P. BELL,

Asst. Treasurer.

JPB/W

200 Mr Hopkins: Mr. Rogers I will ask you if that is a letter that you received? (Handing document to witness.)

A I cannot vouch for that without referring to the records.

Q Well you have no doubt of it have you?

A I have no doubt of it.

Q You have no doubt that it is correct?

A I have no doubt that it is correct.

Q And that it was received?

A And that it was received.

Testimony of
W. M. Rogers.

Mr Hopkins: Mark this as defendant's exhibit 33.
(The document was marked as requested.)

Mr Wyeth: I do not see the materiality of it. Do you offer this?

Mr Hopkins: Oh yes.

Mr Wyeth: I think it is utterly immaterial and irrelevant to anything in this case.

The Court: It may be received.

Mr Hopkins: I will read it so that you may see.

Mr Wyeth: Why, this is long after the transaction in 1910.

Mr Hopkins: Of course it is after the transaction.

The Court: All this—

Mr Wyeth: We can never stop anybody from sitting down and writing a letter:

201 Mr. Hopkins: It is a letter from the Engineering Company.

The Court: I have allowed them to prove acts after this transaction.

Mr. Wyeth: It is the Engineering Company's; it is not our act. If they propose to do that—

Mr. Hopkins: It is in answer to their letter.

The Court: It may be received.

Mr. Hopkins: It is dated January 8, 1910. This marked exhibit 33.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked defendant's Exhibit 33, were read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

Defendant's
Exhibit 33.

202 DEFENDANT'S EXHIBIT THIRTY-THREE (33)

January 8th, 1910.

Mr. J. R. Wiley,
Manager, Standard Underground Cable Co.,
Chicago, Ills.

Dear Sir:

Per your request we take pleasure in enclosing herewith, copies of two papers, one showing Assets—Liabilities and Contracts and the other Moneys To Come In and when, which was submitted to the meeting on Thursday.

We will let you know as soon as the stenographer has written up her notes of the meeting.

Defendant's
Exhibit 33.

Very truly yours,
THE SCHOTT ENGINEERING COMPANY.
C. N. KASSON,
Treasurer.

CVK-S.

203 Mr Hopkins: Q I will ask you if you recognize the signature of your creditor? Testimony of
W. M. Rogers

A Yes, sir, I do.

Q This is his signature, is it? (Indicating.)

A That is his signature.

Mr Hopkins: I will offer this in evidence.

Mr Wyeth: What is that, the proof?

Mr Hopkins: The proof.

Mr Wyeth: We object to it as incompetent and immaterial.

The Court: It is about the same form as the one in the other case?

Mr Hopkins: It puts it a little stronger.

Mr Wyeth: It is *ex post facto* to the transaction.

Mr Hopkins: I will read it.

The Court: You do not need to read it all, Senator.

Mr Hopkins: All right.

The Court: Just the chief parts, Senator.

Mr Hopkins: It is a bill of account with the Schott Engineering Company of Chicago, Illinois, and contains all the items and the credits which have already been offered in evidence on the direct examination, making a total aggregate of \$2,750.70. This is the affidavit of the treasurer of that company, in the bankruptcy court, under date of the 23rd day of May, 1910, in which he states that the Schott Engineering Company, the person against whom the petition for adjudication of bankruptcy has been filed was at and before the filing of said petition, and is still justly and truly indebted to said corporation in the sum of \$2,750.70, with interest from December 7, 1908, at six percent per annum, etc. Mark that exhibit 34.

(The document was marked as requested.)

Which said document last above referred to, so offered and received in evidence as aforesaid, marked defendant's exhibit 34, was read by Mr. Hopkins, and the same is in the words and figures following, to-wit:

Defendant's
Exhibit 34.

205

“DEFENDANT’S EXHIBIT 34.”

Proof of Debt Due Corporation.

DEFENDANT’S EXHIBIT 34.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the Matter of

The Schott Engineering Co., a corp.
Bankrupt.

} In Bankruptcy.
No 17328.

United States of America,
Western District of Pennsylvania
State of Pennsylvania,
County of Alleghany

} ss.

At Pittsburgh, in said Western district of Pennsylvania, on the 23rd day of May, A. D. 1910, came Frank A. Rinehart, of Pittsburgh in the county of Alleghany, and State of Pennsylvania, and made oath and says that he is (1) Treasurer of the Standard Underground Cable Co., a corporation incorporated by and under the laws of the State of Pennsylvania, and carrying on business at Pittsburgh in the county of Alleghany and State of _____, and that he is duly authorized to make this proof, and says that the said Schott Engineering Company, the person (2) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Twenty-seven hundred fifty dollars and 70 cents with interest from December 7, 1908, at 6 per cent. per annum; that the consideration of said debt is as follows: Merchandise furnished to bankrupt by Standard Underground Cable Co. that no part of said debt has been paid (3) that there are no set-offs or counterclaims to the same (4) that said debt (5) became due on the 7th day of December A. D. 19_____, and is evidenced and set forth in the statement hereto attached, marked “Exhibit A” and made a part hereof. That said debt consists of an open account of (6) sever

items maturing at (7) different date; that the (8) average due date thereof is December 7, 1908 that no note has been received for such account, nor any judgment rendered thereon, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

FRANK A. RINEHART

Treasurer of said Corporation.

Subscribed and Sworn to before me, this 23rd day of May
A. D. 1910.

E. J. MCGREW

Notary Public.

(Official Character).

(Notarial Seal)

My commission expires January 19-1911.

- (1.) If there is a treasurer, the deposition should be made by him; see Order XXI.
- (2.) If a Voluntary Bankrupt, insert the word "by." If Involuntary the word "against."
- (3.) If payments have been made, insert the word "except," followed by a statement of the payments.
- (4.) If there are set-offs, etc., insert the word "except," followed by a statement of the set-offs, etc.
- (5.) Insert here this word "became" or "will become."

Exhibit "A."

206

EXHIBIT "A."

Statement.

Standard Underground Cable Co.

In account with

Schott Engineering Company,
Chicago, Ill.

Dr.

1908

Nov. 5, Mdse.

6,474.68

" 6, "

238.41

6,713.09

Cr.

1908

Dec. 24,

3.66

"

4.67

" Cash

3,000.00

Cr.

1909

Nov. 19,

1,000.00

Cr.

1910

Jan. 19,

141.60

4,149.93

2,563.16

Dr.

1909

Dec. 11, Mdse.

199.54

Cr.

1909

Dec. 20, frt.

12.00

187.54

2,750.70

207 Mr. Wyeth: In connection with the Standard Underground claim, which was just up before adjournment at noon, we could like to offer the proof in bankruptcy of W. H. Schott of the claim amounting to \$2563.16, being that portion of the claim in 1908. I will ask this to be marked "Underground Cable Company's,—Standard Underground Cable Company's Exhibit 5.

Whereupon said document so offered and received in evidence, was marked "Standard Underground Cable Company's Exhibit 5," and is in the words and figures following, to-wit:

EXHIBIT "A."

Standard Un-
derground Co.
Exhibit 5.

STANDARD UNDERGROUND CO. EXHIBIT 5.

Statement.

Standard Underground Cable Co.

In account with

W. H. Schott.

Chicago, Ill.

Dr.				
1908				
Nov. 5, Mdse.	6,474.68			
" 6, "	238.41	6,713.09		
Cr.				
1908				
Dec. 24,	3.66			
"	4.67			
" Cash	3,000.00			
Cr.				
1909				
Nov. 19,	1,000.00			
Cr.				
1910				
Jan. 19,	141.60	4,149.93	2,563.16	

David of
Frank A.
Rinehart.

209

Proof of Debt Due Corporation.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the Matter of

W. H. Schott

Bankrupt.

}	In Bankruptcy.
	No 17551.

United States of America,
Western District of Pennsylvania
State of Pennsylvania,
County of Alleghany

} ss.

At Pittsburgh, in said Western district of Pennsylvania, on the 23rd day of May, A. D. 1910, came Frank A. Rinehart, of Pittsburgh in the county of Alleghany, and State of Pennsylvania, and made oath and says that he is (1) Treasurer of the Standard Underground Cable Co., a corporation incorporated by and under the laws of the State of Pennsylvania, and carrying on business at Pittsburgh in the county of Alleghany and State of _____, and that he is duly authorized to make this proof, and says that the said W. H. Schott, the person (2) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of Twenty-five hundred sixty-three dollars and sixteen cents with interest from December 7, 1908, at 6 per cent. per annum; that the consideration of said debt is as follows: Merchandise furnished to bankrupt by Standard Underground Cable Co. that no part of said debt has been paid (3) that there are no set-offs or counterclaims to the same (4) that said debt (5) became due on the 7th day of December A. D. 19 _____, and is evidenced and set forth in the statement hereto attached, marked "Exhibit A" and made a part hereof.

That said debt consists of an open account of (6) several items maturing at (7) different date; that the (8) average due date thereof is December 7, 1908 that no note has been received for such account, nor any judgment rendered thereon, and that

said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

Affidavit of
Frank A.
Rinehart.

FRANK A. RINEHART

Treasurer of said Corporation.

Subscribed and Sworn to before me, this 23rd day of May
A. D. 1910.

E. J. MCGREW

(Notarial Seal)

Notary Public.

(Official Character).

My commission expires January 19-1911.

(1.) If there is a treasurer, the deposition should be made by him; see Order XXI.

(2.) If a Voluntary Bankrupt, insert the word "by." If Involuntary the word "against."

(3.) If payments have been made, insert the word "except," followed by a statement of the payments.

(4.) If there are set-offs, etc., insert the word "except," followed by a statement of the set-offs, etc.

(5.) Insert here this word "became" or "will become."

Indorsed Filed May 25/1910 Frank L. Wean Referee in Bankruptcy.

210 Mr Hopkins: If your Honor please, I ask the privilege of withdrawing the original and substituting a copy of the claim.

The Court: That may be done.

Thereupon counsel for defendant Surety Company requested Mr. Wyeth, counsel for the Standard Underground Cable Co., to produce the letter written by Mr. Schott, President of the Schott Engineering Company, dated November 13th, 1909, enclosing the check for \$1000 referred to by the witness Rogers, and also the letter written by Mr. Wiley, Manager of the Chicago Office, to the Sales Department at Pittsburgh forwarding the requisition No. 4634, introduced in evidence by the plaintiff.

Mr. Wyeth thereupon produced said letters, and the same were offered in evidence by Mr. Peffers, counsel for defendant Surety company, and the same were received in evidence.

Said letters so admitted on behalf of the defendant were and are in the words and figures as follows, to-wit:

Letter, Nov.
18, 1909.

211 (Letterhead of Schott Engineering Company)

"Chicago, November 13th, 1909.

"The Standard Underground Cable Co.,
Pittsburg, Pa.

Gentlemen:—

"I have your esteemed favor of November 10th and have noted the same very carefully. I herewith enclose you check for \$1,000.00 to apply on account, and as I am expecting other remittances between now and the 20th, will wait until that time and see just what we can do further to get this balance cut down to where it belongs.

"The affairs of the company are progressing satisfactorily and I hope, in a short time, to get this where everything will be satisfactory to me.

"The facts in the case are that we could have had this cable shipped in October of this year and we would have had it in ample time, as it has laid there for a year without being used. We are now pulling this cable and it will take us until the first of January to get it installed, and as you have had experience with the Government, you know what shape it puts you in so that we have had to do the best we could under the circumstances and am glad at this time to be able to make a material reduction in the account and will let you hear further from me around the 20th. However, it may be about the 23th or 25th before I can write to you as I leave on the 16th on a southern trip and cannot tell just at this moment how long I will be away.

"Thanking you for the many courtesies you have extended I beg to remain,

Yours very truly,

W. H. SCHOTT."

W. H. S.—C

Enclosure."

Letter, Nov.
18, 1909.

212 (Letterhead of Standard Underground Cable Co.)

To Central Sales Department.

Subject:

Chicago, Nov. 18, 1909.

Schott Engineering Co. Chicago Ill.

"Gentlemen:

W. H. Schott C-5181

1673

We hand you enclosed Chicago Order No. 5181 in the name

of the Schott Engineering Co. for quick shipment, as set forth in the order and we give you in explanation the information that this lot of material is required to finish up the Schott job at the Naval Training Station, North Chicago, Ill. You will find attached to our order an explanatory letter from our customer informing us that this little lot of material need not be inspected at your factory in the usual way, but will be required to meet the same requirements and inspection at destination. We are not positive that any detail tests will be made upon the material after it arrives at destination as the chances are as soon as it arrives it will be grabbed and connected up by the contractor.

Referring now to overdue account of W. H. Schott. Mr. Schott tells us that he remitted \$1000 several days ago and he tells us also that he has written you a letter explaining that by the first of the year he will have remitted the balance of the account and inasmuch as the Schott Engineering Co. assumed all of the business rights titles etc. of W. H. Schott, you will note the order comes to us and we have made out our order in the name of the Schott Engineering Co.

We do not hesitate to recommend that you go ahead and bill this little order as promptly as possible and we are quite sure that the account will be fully settled in accordance with Mr. Schott's recent advises to our Treasurer.

The point we want to make in this transaction is that in order to finish up the old job they must have this new material and they must have it just as quickly as it is possible to get it to them

We imagine that our Treasurer will be somewhat relieved by the recent remittance of \$1000 from Mr. Schott and as already explained we have an idea that the whole account will be eventually settled to your entire satisfaction.

Very respectfully,

STANDARD UNDERGROUND CABLE CO.

Per J. R. WILEY
Western Manager"

W-K
Enc

Letter, Nov.
18, 1909.

Testimony of
W. F.
Wandtke.

213 W. F. WANDTKE a witness called on behalf of the plaintiff, Racine Stone Company, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Mr Peffers: This is of 1909, Mr. Wyeth?

Mr Wyeth: Well, the only difference in this case, as I understand it, is that there was a general contract made in August 1908.

Mr Peffers: I don't know anything about that. You will have to prove that.

Mr Wyeth: And different orders came along from time to time; is that right Mr. Wandtke?

A Yes sir.

Mr Peffers: What is it you allege in the bill of particulars that is charged to Schott and the Schott Engineering Company? Now, let me see what his book accounts are. I couldn't find anything out about that claim at all. Where is the book that shows what part is charged to Schott and what part is charged to the Schott Engineering Company?

(Whereupon counsel confer out of the hearing of the reporter)

Mr. Wyeth: Against whom were those materials of the Racine Stone Company charged?

A W. H. Schott.

Q On what books?

214 A Books of the Racine Stone Company.

Q Yes, but which particular book,—the ledger?

A Ledger and daily reports.

Q You had done business with Schott prior to 1909?

A Yes, sir.

Mr. Wyeth: Well, the books will have to be brought to show it.

Mr. Peffers: His bill here shows the Schott Engineering Company. It is a small claim, and it is in 1909.

Mr. Hopkins: All furnished in 1909, and the bill as presented shows it is charged against the company.

The Court: You had an account with Schott personally before that time?

A Yes, sir, W. H. Schott.

The Court: And then in 1909 it continued right along under the same head?

A Continued under the old head.

The Court: That explains it.

A Yes, sir.

Mr. Peffers: He has got a bill here, if the Court please.

The Court: That explains it. It is a matter of inconvenience for him to change the heading of the accounts on the books.

Mr. Hopkins: That may go in charged to the Schott Engineering Company.

Mr. Peffers: We will stipulate, if you will, that that item go in on the Schott Engineering accounts, 1909.

215 Mr. Wyeth: That it went under this contract for crushed stone, for all crushed stone, and this tail end of it, in 1909,—that is all the difference,—started in with W. H. Schott, and as far as those books are concerned, always stayed that way.

Mr. Peffers: Well, who has he got his charge against? Who is he making his claim here against, the Engineering Company or Schott? Now, tell us that.

Mr. Hopkins: His bill of particulars is against Schott Engineering Company.

Mr. Wyeth: No, that is not the bill of particulars.

Mr. Peffers: Here it is right here. I have a copy of it. W. H. Schott and Schott Engineering Company.

Mr. Wyeth: The bill of particulars in the case is filed against W. H. Schott and Schott Engineering Company. Now, it seems to me it is all explained, except that I would like to have the contract of 1908 put in.

The Court: Put it in Mr. Wyeth.

Mr. Wyether: Q Is this the contract under which this stone was furnished from time to time? (Handing document to witness)

A Yes, sir.

Q By whom is it signed there?

A Signed by the Racine Stone Company, D. P. Plummer Vice-President and General Manager.

Q And W. H. Schott by M. O. Payne, General Man-
216 ager.

The Court: What is the date of it?

Mr. McKenzie: What is the date of that?

A August 12th, 1908.

Mr. Wyeth: We will offer that as Racine Stone Company's Exhibit 1.

Testimony of
W. F.
Wandtke.

Mr. Hopkins: Now, then, we stipulate that—

The Court: The material was furnished in 1909, is that right?

The Witness: Part of 1908 and 1909.

The Court: Part of 1908.

A Yes.

Q Paid for, was it, in 1908?

A 1908 was paid for, yes, sir.

Mr. Wyeth: And the balance of the account now is how much,—I will get the dates,—is how much, Mr. Wandtke?

A \$113.28.

Q Now, in what period was the stone furnished which makes up that?

A During the months of November and December of 1909.

The Court: Have you computed interest on that?

Mr. Wyeth: Have you computed the interest on that? Is this your sheet?

A No, sir. \$9.75.

217 Q Making a total of how much?

A \$123.03.

The Court: Used on this job by the Schott Engineering Company?

A Yes, sir.

Mr. Peffers: Yes, used by the Schott Engineering Company.

The Court: That seems to cover that.

Whereupon said document so offered and received in evidence was marked "Racine Stone Company Exhibit 1" and is in the words and figures following, to-wit:

Racine Stone
Co. Exhibit
1.

218

RACINE STONE CO. EX. 1.

Chicago, Ills.

This Contract, made and entered into this 12th day of August, A. D. 1908, by and between Racine Stone Co., a party of the first part, and W. H. Schott, party of the second part Witnesseth:

That, party of the first part hereby agrees to sell, and the party of the second part hereby agrees to purchase, all of the Crushed Lime Stone known as No. 2 or concrete, to be used by party of the second part, for the following purposes:

For The Conduit System let to said party of the second part

U. S. Government for Naval Training Station, North Chicago, Ills.

Racine Stone
Co. Exhibit
1.

price:

It is agreed that said party of the second part will pay to the party of the first part, 1.10 less freight per cubic yard, twenty-five hundred (2500#) pounds, Railroad Weights to govern. F. O. B. Naval Training Station, No. Chicago, C. M. E. R. R. delivery in Dump cars, D. P. P.

terms:

It Is Further Understood and Agreed, That for all stone purchased in any one month, a discount of five (5) cents per cubic yard will be allowed if paid on or before the 15th of the month following purchase.

This contract is subject to strikes, labor troubles, our inability to procure cars, and other contingencies beyond our control.

RACINE STONE Co.

By D. P. PLUMMER,
V. P. & G. M.

W. H. SCHOTT,

By M. O. PAYNE,
G. M.

19 Mr. Peffers: If the Court please, I want to offer the claim that was filed in bankruptcy against the Schott Engineering Company solely, dated March 25, 1910.

Mr. Wyeth: You mean you are offering a claim in bankruptcy against the Schott Engineering Company estate.

Mr. Peffers: Yes.

Whereupon said document so offered and received in evidence was marked "Defendant's Exhibit 39," and is in the words and figures following, to-wit:

Defendant's
Exhibit 39.

220

DEFENDANTS EX. 39.

Racine Stone Company,

206 La Salle Street,

Chicago, March 25, 1910.

Schott Engineering Co.,

Chicago.

1909

Nov.

2	10.00	yds.	stone	6.00
4	9.80	"	"	5.88
8	13.20	"	"	7.92
9	10.80	"	"	6.48
11	11.60	"	"	6.96
13	11.40	"	"	6.84
15	13.40	"	"	8.04
18	10.00	"	"	6.00
19	15.40	"	"	9.24
29	36.80	"	"	22.08

Dec.

8	32.00	"	"	19.20
9	14.40	"	"	8.64

EXHIBIT "A."

Exhibit "A."

221

PROOF OF INSECURED DEBT.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

In the matter of The Schott Engineer-
ing Co.,
Bankrupt,

{ In Bankruptcy,
No. 17328.

United States of America,
Eastern Dis. Northern District of Illinois
State of Illinois,
County of Cook

} ss

At Chicago, in said northern district of Illinois, on the 25th day of March, A. D. 1910, came Pierre G. Beach, Secretary of Racine Stone Co., a corporation of the State of Wisconsin, and made oath and says that the said The Schott Engineering Company, the firm against whom a petition for adjudication of bankruptcy has been filed was at and before the filing of the said petition, and still is justly and truly indebted to said deponent in the sum of One Hundred Thirteen (\$113.28) dollars and Twenty-eight cents; that the consideration of said debt is as follows, 188.80 yards of crushed stone shipped and delivered November 2, 4, 8, 9, 11, 13, 15, 18, 19 and 29, also December 8 and 9, 1909, that no part of said debt has been paid, that there are no set-offs or counter-claims to the same, that said debt became due on the 9th day of December, A. D. 1909, and is evidenced and set forth in the statement hereto attached, marked Exhibit A, and made a part hereof.

That said debt consists of an open account of twelve items maturing Dec. 9, 1909, that no note has been received for such account, nor any judgment rendered thereon, and that deponent has not, nor has any person by his order, or to his

chibit "A."

knowledge or belief, for his use, had or received any manner of security for said debt whatever.

RACINE STONE COMPANY,
By PIERRE G. BEACH,
Secretary,
Creditor.

222 Subscribed and sworn to before me this 25th day of March, A. D. 1910.

(Seal) F. A. ROBT. MOTT,
Notary Public in and for Cook County,
State of Illinois.

Filed Dec. 7, 1910. Frank L. Wean, Referee in Bankruptcy.

223

May 31st, 1913.
2:00 o'clock P. M.

Court Met Pursuant to Adjournment.

Mr. Wyeth: If your Honor please, in the case of Roebling Construction Company, I think it will be stipulated and agreed, as shown on a sheet which we have here, that from September 3, 1908, to December 15, 1908, the Roebling Construction Company furnished water for the use of certain engines and mixers at a price of \$47.55, on this job at the Naval Training Station, and that from June 30, 1909, to December 24, 1909, the Roebling Construction Company furnished mixers and water and gravel, some concrete to the extent of—no, the first amount should be corrected there to \$73.55.

Mr. Peffers: All right.

Mr. Wyeth: \$73.55, and as I was stating, from June 30, 1909, to December 24, 1909, the materials referred to amount to the sum of \$99.13; that this amount is unpaid, and that the interest on that first amount of \$73.55, at five per cent, from August 16, 1911, to date, is \$6.43, making that amount total \$79.98, on the orders of W. H. Schott, and the interest on the latter amount of \$99.13, in 1909, furnished Schott Engineering Company, at the same rate for the same period,
224 \$8.67, making a total of \$107.60, and that this is unpaid.

Mr. Peffers: The items furnished in 1908 were furnished to Schott, and the items in 1909 were furnished to the Schott Engineering Company, and so charged in the original bills, if there is any question about it.

The Court: That is admitted.

Mr. Peffers: And then I want to preserve the objection

that this is for the use of machinery. I want to preserve that objection on both these bills.

Mr. Wyeth: And I suppose the usual stipulation as to that.

Mr. Hopkins: Yes.

Mr. Wyeth: I don't think we want to offer any more on that.

Mr. Peffers: I want to offer in that connection, if the Court please, the claim that was filed in bankruptcy, and that claim, the total amount of it is included in the claim, duly executed and verified claim in bankruptcy.

The Court: That is the engineering company.

Mr. Peffers: This is the engineering company, for the entire bill.

The Court: Yes, before and after.

Mr. Peffers: Yes.

Whereupon said document so offered and received in evidence, was marked "Defendant's Exhibit 37 and is in the words and figures following, to-wit:

225

DEFT'S. EXHIBIT 37.

Defendant's
Exhibit 37.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois.

In the Matter of the Schott Engineering Company, }
Bankrupt. } In Bankruptcy
No. 17,328.

At the City of Trenton, in the District of New Jersey, on the 6th day of July, A. D. 1910 came Frank O. Briggs, of the City of Trenton, in the County of Mercer and State of New Jersey and made oath that he is the treasurer of The Roebling Construction Company, a corporation incorporated by and under the laws of the State of New Jersey and carrying on business at the City of Chicago, in the County of Cook, in the State of Illinois, and that he is duly authorized to make this proof and says that the said Schott Engineering Company against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said corporation in the sum of \$143.71; that the consideration of said debt is as fol-

Defendant's
Exhibit 37.

lows: Goods sold and delivered and services rendered, as more particularly specified in Schedule A, hereto annexed and made a part hereof; that no part of said debt has been paid; that no note has been given therefore; that there are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon and that said corporation has not nor has any person by its order or to the knowledge and belief of said deponent, for its use, had or received any manner of security for said debt whatever.

Subscribed and sworn to before me this 6th day of June 1910.

FRANK O. BRIGGS

HARVEY COOLEY,

Notary Public of New Jersey

Schedule A.

226

SCHEDULE A.

October 28, 1908, water for September, 8 days		
for engine for mixer at 50 cents,	\$ 4.00	
4 days for steam ditcher at fifty cents		
(steaming)	1.50	
13 days for steam ditcher (running)	13.00	
Total,		\$18
September 3, 1908, for unloading concrete		
mixer from car with derrick,	8.00	8
December 15, 1908, water charges 19 days for		
mixer at 50 cents a day,	9.50	
11,313 cubic feet of concrete at 8 cents		
per hundred cubic feet	9.05	
19 days for ditcher running (ditcher		
uses 1500 gallons of water per day		
at \$1. per thousand—28,500 gal-		
lons,	28.50	47
Total,		47
July 24, 1909, water charges 20 days		
for mixer at 50 cents a day,	10.00	
12,069 cubic feet of concrete at 8		
cents per hundred,	9.66	19
Total		19

September 14, 1909, water charges 8 days for mixer at 50 cents per day,	4.00		
9018 cubic feet of concrete at 8 cents per hundred feet,	7.21	11.21	
Total		11.21	
October 1, 1909, 16 cubic yards of gravel at \$1.35 per yard,	21.60	21.60	
November 18, 1909, 7 cubic yards of gravel at \$1.35 per yard,	9.45	9.45	
227 November 19, 1909, water charges for month of October, 10 days for mixer at 50 cents per day \$5.00			
4050 feet of concrete at 8 cents per hundred cubic feet	3.24	8.24	\$143.71
Total		8.24	
Total			\$143.71

Indorsed: "Filed at 3.20 o'clock P. M. July 11-1910. Frank L. Wean Referee in Bankruptcy."

228 It is admitted and shown in evidence that in the case of the Roebbling Construction Company that the supply and furnishing of ditcher and other materials was not for a rental therefor, but was for work and labor done by said Roebbling Construction Company, with said machines.

229 Mr. Peffers: Is there any object, Mr. Wyeth, for me to introduce the bills for the 1909 stuff, the original bills?

Mr. Wyeth: For what?

Mr. Peffers for the 1909 stuff that was run against the Schott Engineering Company.

Mr. Wyeth: Well, you have got them. We checked them over, didnt we?

Mr. Peffers: Yes. These are the vouchers that run against the Schott Engineering Company for 1909 stuff, just a small amount. I dont want to introduce them.

Mr. Wyeth: You have got all of them, havent you?

Mr. Peffers: Well—your bill of particulars runs against both companies.

Mr. Hopkins: Put them in evidence.

Mr. Wyeth: Well, you are offering some of the original invoices furnished the Engineering Company in 1909. I

statements
of counsel.

dont know whether they are all invoices of the Schott Engineering Company or not, whatever you have offered.

(Whereupon counsel confer out of the hearing of the reporter)

Mr. Peffers: Well, let that be understood then.

Mr. Wyeth: Yes, that the 1909 items referred to in the stipulation allowing the matter to go in were furnished to 230 and charged to the Schott Engineering Company.

Mr. Peffers: That is sufficient. All right.

Thereupon the John Davis Company; the Universal Portland Cement Company; the Standard Underground Cable Company; the Racine Stone Company and the Roebling Construction Company, use plaintiffs, and each of them, rested their cases.

231

May 22nd, 1913.
Two o'clock P. M.

Court met pursuant to adjournment.

Mr. Hopkins: If your Honor please, Mr. Blount, the former President of the Illinois Surety Company is here and he left a very important appointment to come here.

The Court: Call in the jury.

Mr. Wyeth: I would like to have Mr. McKenzie here, because he is familiar more with this part of the case than I am.

The Court: He will probably be here right along.

Mr. Wyeth: Mr. McKenzie. I think, has given a little thought to this branch of it, that is what I mean.

The Court: Well, he will probably be here.

Mr. Wyeth: Of course, I only suggest that.

Testimony of
Fred Blount.

MR. FRED BLOUNT, called as a witness on behalf of the defendant Surety Company, having been first duly sworn was examined in chief by Mr. Hopkins, and testified as follows:

Q Mr. Blount, you were president of the Illinois Surety Company, the 3rd day of August, 1908, were you not?

A Yes, sir.

Q And held that position for several years after that before you resigned?

A Yes, sir.

232 Q Do you remember writing a bond for W. H. Schott

A Yes, sir.

Q Now, I will ask you, Mr. Blount, if the Illinois Surety Company ever consented to W. H. Schott transferring the contract which the Illinois Surety Company had bonded to the Schott Engineering Company or anybody else?

Mr. Wyeth: Just a moment. I object to that, it is improper in form and asking for a conclusion of the witness instead of facts.

Mr. Hopkins: Well, it is proving a negative, that is what I have to do.

Mr. Peffers: He didnt say what he did.

Mr. Hopkins: It shows what he did do.

Mr. Wyeth: I dont know if he ever did anything with regard to this bond after it was issued.

The Court: Ask him if he heard about it.

Mr. Hopkins: Q Well, did you—first, did you ever consent to any such—to the transfer of or the assignment of the contract from Schott to the Schott Engineering Company?

Mr. Wyeth: That is objected to as improper and incompetent and improper in form.

Mr. Hopkins: Well, there is nothing improper about that.

Mr. Wyeth: Asking for a conclusion of the witness. It would be simply his judgment as to whether or not he
233 had consented or his company had consented.

Mr. Allan: What transactions took place?

The Court: Ask him if he did anything in regard to such an assignment to the Schott Engineering Company.

Mr. Hopkins: Q Did you do anything, or did the Illinois Surety Company under your administration, do anything towards an assignment of this contract which the Illinois Surety Company had bonded, from Schott to the Schott Engineering Company?

Mr. Wyeth: I object to it now on the ground that it is immaterial.

The Court: Overruled.

Mr. Hopkins: Go ahead.

A No sir.

Q When was the first knowledge that the Illinois Surety Company had that Schott had assigned the contract to the Schott Engineering Company?

A When the—

Mr. Wyeth: Wait a moment. I object.

A —bankruptcy proceedings came on.

Mr. Wyeth: Just a moment.

Testimony of
Fred Blount.

A I beg pardon.

Mr Wyeth: I don't think that is in proper form, and it asks as to when the first information came to the Surety Company. Now, he can tell what he knows about it.

Mr Hopkins: Well, he is the president.

The Court: Ask him what he knows about it.

234 Mr. Hopkins: Q Well, Mr. Blount, as President, you had full management of the company, did you not?

A Yes, sir.

Q There was nothing of any importance that wouldnt be brought to your attention, would there?

A Not of that kind, there certainly wouldnt.

Q Now, I will ask you Mr. Blount, when was the first time—

Mr. Wyeth: I think that ought to be stricken out.

The Court: Let it stand.

Mr. Hopkins: Q When was the first time that the Illinois Surety Company had information that this contract, the Illinois Surety Company had bonded, was transferred from Schott to the Schott Engineering Company?

A When the bankruptcy proceedings were begun.

Q That was about the time that you sent me over here to protest before Judge Landis against the assignment?

A Yes, sir.

Mr. Hopkins: That is all.

Cross-Examination by Mr. Wyeth.

Q Where do you reside, Mr. Blount?

A My resident is Wheaton, Illinois, sir.

Q How long have you resided there?

A About seven years over there.

Q And about the same length of time you have been President of this Surety Company, six or seven years, I think you said?

A I am not president of the company now, sir.

Q How long since you have been president?

A About three years.

Q You ceased to be president in 1910, or before?

A I think it was April, 1910.

Mr Hopkins: Sometime in 1910.

A 1910.

Mr Wyeth: Well now, I want him to testify.

Q Mr. Blount, do you have any recollection as to the

Q What time when you ceased to be president of the Illinois Surety Company or any other officer of it?

A Between the 15th day of March and the 1st day of April in 1910.

Q 1910?

A I can't give you the exact date.

Q You are sure it was 1910?

A Yes sir.

Q Are you engaged in any other business besides the Surety Company?

A I am in the surety business now, sir.

Q Well, during the time that you were president?

A No sir.

Q Was that your main occupation?

A That was my main occupation.

Q Or did you engage in other business?

A Nothing else.

Q Now, do you know who paid this Illinois Surety Company any premiums on this matter after the beginning and inception of this bond?

A That matter wouldn't come before me, sir.

Q What is the answer?

A The matter wouldn't come before me. You would have to inquire of the auditing department.

Q And as to all communications with regard to who was paying premiums on this policy, would you know anything about that?

A No sir. I could know, but I don't specifically know.

Q What is it?

A I could know but I don't specifically know.

Q And you knew where this work was located?

A At the time, yes.

Q Have you, and how long have you known William H. Hott?

A Oh, I think he had been doing business with us a couple of years, or more maybe; I can't give you the exact time.

Q Well, at the time, simply two years past?

A Well, I think I knew him before this bond was written.

Q Well, you stated a couple of years?

A Prior to the writing of this bond.

Q He had been doing business?

A He had been doing business with us.

Q So that in reality, you didn't have your office at the

Testimony of
Fred Blount.

offices of the Illinois Surety Company during this
237 period?

A What is that?

Q During this period up to 1910, you didn't have your own office at the Surety Company's offices at that time?

A I was president of the company and had my room there and was there every day attending to duties.

Q Every day. You went there every day from other business?

A I told you a few moments ago, that was the only business I had.

Q At that time?

A At that time, a salaried officer of the Illinois Surety Company.

Q Did you have any communications or receive any from William H. Schott prior to the time that you ceased to do business there as president, ceased to be president?

A I don't know what you have reference to, sir.

Q Letters or communications from W. H. Schott.

A Did I receive any letters or communications?

Q Yes.

A I know of no communications that I got—my recollection now is, I know of no communications between W. H. Schott and me on any subject whatever during the time that this contract was in force, that this bond was in force.

Q So the communications that you did receive were upon the subject of this naval training job.

238 Mr Hopkins: Why, he didn't say that he received any.

Mr Wyeth: He said he didn't have any recollection of receiving communications on any other subject as I understood.

A I didn't say other, I said any whatever.

Mr Wyeth: That is all.

Re-direct Examination by Mr. Hopkins.

Q Mr. Blount, would this bond have been written if it had not been for the Creditors' Committee?

Mr Wyeth: I object to that.

Mr Hopkins: We claim, if your Honor please, that the Creditors' Committee inveigled us into writing this bond.

The Court: I think that is immaterial.

Mr Hopkins: Well, I don't know but it is from a legal

point of view, but I have been indignant ever since it was written when we found—

Testimony of
Fred Blount.

The Court: Yes.

Mr Wyeth: Well, I think that is improper, and I object.

The Court: Sustained.

Mr Hopkins: Well, that is all from Mr. Blount. I am much obliged to you.

Mr Hopkins: Now, if your Honor please, we have brought our Auditor, we have had our books examined. The statement was made in court that the Schott Engineering company had paid the premium. Now, I am prepared, if they want to put our Auditor on, you can put him on.

Mr Wyeth: What do we want him for.

Mr Hopkins: Well, you were insinuating that—

Mr Wyeth: I am making none.

Mr Hopkins: Well, that is all right. If you are making any insinuations, why we—

Mr Wyeth: We want only evidence.

Mr Hopkins: That is all, if the Court please.

The Court: Now, I think the jury may be excused. There is no further testimony until tomorrow morning. It will take all the afternoon, and there is another case going on at four o'clock. Gentlemen, you may be excused until 9:30 tomorrow morning.

James B. Clow & Sons.

ORLANDO WARE called as a witness on behalf of the claimant, James B. Clow & Sons, having been first duly sworn, was examined in chief by Mr. Schmidt, and testified as follows:—

Testimony of
Orlando
Ware.

Q. State your name?

A. Orlando Ware.

Q. What is your occupation?

A. Credit man for James B. Clow & Sons.

Q. How long have you been employed in that capacity?

A. 11 years.

Q. How long,

A. About 11 years.

Q. What are your duties in connection with that?

A. Why, to pass on credit on orders that come in.

Testimony of
Orlando
Ware.

Q. Are you acquainted with W. H. Schott?

A. Yes sir.

Q. Did you have any negotiations on behalf of the firm of James B. Clow & Sons in respect to materials to be purchased from your firm in connection with the construction of the Naval Training Station, North Chicago?

A. Yes sir.

Q. Will you state what those were?

A. Why, I called—

Q. What?

Mr. Peffers: Wait a minute. I object if it cul-
241 minated in written contracts.

Mr Schmidt: It is preliminary.

Mr Peffers: All right.

Mr Schmidt: It is a little preliminary.

Mr Peffers: All right.

A I called at the office of the Schott Engineering Company, our salesman having reported there was business to be gotten there.

Q Speak louder, I cant hear you.

A I say I called at the office of the Schott Engineering Company, our salesman having reported there was business to be gotten there, that they had a number of contracts, and I called there to ascertain in regard to the payment of the material in the event of our getting the orders and the acceptance.

Q Did the firm of James B. Clow & Sons subsequently furnish any goods?

A Yes, sir.

Q Mr. Ware, are you familiar with the amount of goods which were sold by James B. Clow & Sons in connection with this Naval Training Station job?

A Yes, sir.

Q I hand you certain documents here and ask you if you will state to the court and the jury what those documents are?

A These documents are the original orders—

Q Original order from whom, Mr. Ware?

A Original orders from the Schott Engineering Company.

242 Q Original orders, you mean, Mr. Ware?

A Original orders from the Schott Engineering Company for material charged on the attached charge slips, and also the railway company's or common carrier company's

receipts for the material, all of which was shipped to the Naval Station at North Chicago.

Q When you say the common carrier, railroad company or express company, as the case may be, receipts,—you mean those are the receipts given when the goods were shipped?

A That is it.

Q And the goods were shipped to the Schott Engineering Company at North Chicago?

A Yes, sir.

Q In addition to the receipts from the railway company or express company, as the case may be, for the goods that were shipped, what other documents are attached to those papers which you have?

A Well, the original order from Schott Engineering Company.

Q Yes, you have covered that.

A Our charge slip.

Q Your original charge slip, that is what I want to get t.

A Our charge slips.

Q Those are the original charge slips of James B. Clow Sons, are they?

A Yes, sir.

Q They speak for themselves. I want to ask what they show. Those charge slips may be stipulated to show the amount of materials,—and are you familiar with the fair and reasonable prices of the materials furnished?

43 A Yes, sir.

Q And are those charges fair and reasonable for the materials which were furnished?

A Yes, sir.

Q I want to hand you one other paper here Mr. Ware, and ask you if you will state what that document is?

A This is a document, this is a statement, itemized statement of the material furnished the Schott Engineering Company, for the Naval Station at North Chicago.

Q Has that material been paid for, has James B. Clow Sons ever received payment for that material?

A Not a dollar.

Q What is the outstanding amount due on the material which was furnished?

A \$2015.54.

Q As shown by that slip?

A As shown by that statement.

Testimony of
Orlando
Ware.

Q Were they compared with the slip,—summarizing the items with the total—with the bill of particulars which was filed by James B. Clow and Sons in this case?

A Yes, sir.

Q Will you state whether they are covering the same items?

A They cover the same items, with one exception.

Mr Schmidt: I may state to the court that one exception is an item of \$1.54. We haven't got the bill for that. It is a very small amount, and if Mr. Peffers does not want to admit that item—

Mr Peffers: What is that?

244 Mr Schmidt: There is an item of \$1.54 in our bill of particulars, in the same way, but the other bill was not secured and does not show in the—

Mr Peffers: If you want the \$1.50, add it to the bill.

Mr Schmidt: It doesn't make any difference to me. I am willing to cut it out.

Mr Peffers: Buy some cigars with it.

Mr Schmidt: Will you repeat your total of the outstanding amount due?

A \$2015.54.

Q Have you computed the interest on that amount from August 16, 1911 to date, or to May 20, that is near enough May 20, 1913?

A Yes, sir.

Q Will you state how much that interest amounts to?

A \$177.49.

Q Making a total of how much, with the interest and the original principal amount due?

A Let's see. \$2193.03.

Q How much did you say, Mr. Ware?

A \$2193.03.

The Court: What was the rate, 5 per cent?

A 6—no, 5 per cent.

Mr Schmidt: 5 per cent?

A Yes.

Mr Schmidt: I take it it may be stipulated into the record these goods were used at the Naval Training Station at South Chicago—

Mr Peffers: By the Schott Engineering Company.

245 Mr. Schmidt: North Chicago.

Mr. Peffers: Counsel suggests that you need not off

all of that, but introduce this petition there, and it will save putting all of that into the record.

Mr Schmidtt: I dont want to encumber the record. Do you stipulate that the plaintiff, James B. Clow & Sons—

Mr Peffers: It was all on orders of the Schott Engineering Company?

Mr Schmidtt: Yes, and all shipped on orders of the Schott Engineering Company—

Mr Peffers: The charges are all against the Schott Engineering Company?

Mr Schmidtt: Yes. The goods were shipped to the Schott Engineering Company at North Chicago; and that the charges, the fair and reasonable and market value of these goods shipped amount to \$2015.54, plus interest of how much?

The Witness: \$177.49.

Mr Schmidtt: Being computed at the rate of 5 per cent on the above amount, from August 16, 1911, to May 20, 1913, making a total of—

The Witness: \$2193.03.

Mr Peffers: That is the total claim.

Mr Schmidtt: Yes, including the interest.

Mr Peffers: I see. All right.

Mr Schmidtt: Also that the materials referred to—that Clow & Sons have not been paid for the materials 246 mentioned, and that these materials were used in the construction of the Naval Training Station at North Chicago.

Mr Peffers: By the Schott Engineering Company.

Mr Schmidtt: Well, that is part of your stipulation.

Mr Peffers: Well—

Mr Schmidtt: All I want to show is that they were used. I contend that it makes no difference.

Mr Peffers: I say, by the Schott Engineering Company, that is what I am willing to admit.

Mr Schmidtt: Well, let it go in that way, I dont care.

Mr Peffers: That is all.

Mr Schmidtt: No, that is not quite all.

Mr Peffers: All right.

Mr Schmidtt: Let me have these bills.

Q Mr. Ware, at the time that you had your first talk with respect to furnishing goods—well never mind, I won't go into that feature, Mr. Ware. That is all.

Mr Peffers: That is all.

Testimony of
Orlando
Ware.

The Court: That is all.

Mr Schmidt: Just one question. I want to ask you between what dates these goods were furnished.

A Between September 1909 and December 31.

Q Between September 4 and December 31, 1909?

A Yes, sir.

Mr Schmidt: That is all.

Mr Peffers: All right.

Stebbins Hardware Company.

Testimony of
Mr. Stebbins.

247 MR. STEBBINS, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Mr. Wyeth: Any objection to this claim? This is of the 1909 account, isn't it?

A I don't recall the date.

Mr. Peffers: We will stipulate on this claim.

Mr. Wyeth: It is stipulated in this case that in 1909—

Mr. Peffers: Stebbins Hardware Company.

Mr. Wyeth: That the Stebbins Hardware Company furnished materials from time to time on the orders of the Schott Engineering Company, and shipped and delivered these materials for use by said Schott Engineering Company on the Schott contract at North Chicago. They were charged to the Schott Engineering Company, is that right?

A Yes sir.

Q And that the amount is \$171.15, unpaid, and that the interest on that from August 16, 1911, is \$14.95, making it \$186.10?

A Yes.

Q. Unpaid?

A That is right, yes sir.

Mr. Peffers: It is all charged on your books against the Schott Engineering Company, isn't it?

A. Yes sir.

The Court: Used on this job?

Mr. Peffers: By the Schott Engineering Company,

The Court: By the Schott Engineering Company,

A. Yes.

Mr. Wyeth: I think that will be all, Mr. Stebbins.

8 D. E. Garrison, Jr., doing business as Garrison and Company, and the Corrugated Bar Company.

JOSEPH F. WEISS called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Testimony of
Joseph F.
Weiss.

The Court: What claim is this?

Mr. Wyeth: Perhaps we can stipulate as to this Corrugated Bar Company. This is Garrison & Company and the Corrugated Bar Company; that is, Garrison & Company was the old name, and absorbed by the Corrugated Bar Company, \$75.25, order of Schott Engineering Company.

Mr. Hopkins: September, 1909, by the Schott Engineering Company.

Mr. Wyeth: I understand that counsel will stipulate, and to stipulate in this case, that on the order of the Schott Engineering Company, dated September 23rd, 1909, the Garrison Company and Corrugated Bar Company—

Mr. Peffers: Being one and the same Company.

Mr. Wyeth: being one and the same company, or are interested together in this matter, delivered on or about October 8th, 1909, corrugated bars of the value of \$75.25.

Mr. Peffers: On the order of the Schott Engineering Company.

Mr. Wyeth: That is what I said. Shipped to North Chicago.

Q. Does this \$75.25 remain unpaid?

A Yes sir.

Q Have you computed the interest from August 16, 1911?

A \$5.86.

Q. \$5.86

A \$6.58

Q Making a total—how much?

A \$6.58.

Q The total amount now is how much?

A \$81.83.

249 Mr. Peffers: Did you state in there that that was shipped on the order of the Schott Engineering Company?

Mr. Wyeth: Yes.

A Yes sir.

The Court: Used on this job by that Company.

Testimony of
Joseph F.
Weiss.

Mr. Wyeth: The name of the witness, what is your name?

A Joseph F. Weiss.

Q What relation do you bear to the Corrugated Bar Company?

A Office Manager, Chicago office.

Mr. Wyeth: The claimant is D. E. Garrison, Jr., doing business as Garrison and Company, and the Corrugated Bar Company.

250 Western Kieley Steam Specialty Co.

Testimony of
John Boyles-
ton.

JOHN BOYLESTON called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Mr. Peffers: What claim is this?

Mr. Wyeth: Western Kiely Steam Specialty Company.

Q What is your name?

A John Boylston.

Q Are you connected with the Western Kieley Steam Specialty Company.

A Yes sir.

Mr. Peffers: What is the amount of that bill Mr. Wyeth?

Mr. Wyeth: \$150.00

Mr. Peffers: All right. I will agree with you on that very shortly.

Mr. Wyeth: It is stipulated then that the Western Kieley Steam Specialty Company furnished materials in the amount of \$150.00, on November 17, 1909, to the Schott Engineering Company, on this order.

Mr. Peffers: On this order number 4638

Mr. Wyeth: And that the materials were shipped on the order about that date to W. H. Schott, North Chicago, 251 care of the Naval Training station.

Q Has any part of that bill of \$150 been paid?

A No sir.

Q Have you computed interest on it in the past year and three quarters?

A I have computed interest, I believe, for a year and three quarters.

Q That is from August 16th, 1911?

A Yes.

Q Can you state how much the interest is?

A \$13.11.

Q Making the total amount—

A \$163.11.

Q That is unpaid?

A That is unpaid.

Mr Peffers: That is charged to the Schott Engineering Company, is it?

A It is.

Q And furnished on their order?

A Yes.

The Court: Used on this job.

Mr Peffers: Yes.

A The account on the books is W. H. Schott.

Mr Peffers: What is that?

A Our account on the books is W. H. Schott.

Mr Wyeth: That is on your ledger, isn't it?

A On the ledger.

Q The old account?

A The old account.

Q It simply goes onto that book in due course, and you didn't change the top, under the heading of "Schott" is that it?

A That is it.

252 Mr Peffers: Your claim here is against the Schott Engineering Company, isn't it?

A That is it.

Mr Peffers: All right.

253

Electric Appliance Company.

It is admitted that the Electric Appliance Company sold and delivered to the Schott Engineering Company in 1909, and prior to January 15th, 1910, a quantity of materials for use in the prosecution of the work under the Schott contract with the Government amounting to the sum of \$565.28 which was over due at the time of the commencement of this suit and no part of the same has been paid, and that the said materials were used in the prosecution of the work by the Schott Engineering Company under the said contract with the Government. The ledger account of the Electric Appliance Company with the Schott Engineering Company was introduced in evidence as Electric Appliance Company's Exhibit No. 1, in words and figures following, to-wit:

Electric Appli-
ance Com-
pany's Ex-
hibit No. 1.

The Schott Eng. Co.

City.

Electric Appliance Company.

	1909	
Aug.	11,	5.04
	12,	14.83
	16,	180.09
	17,	4.88
	13,	.37
	26,	.58
Sept.	4,	.89
	15,	3.11
	16,	11.59
	17,	79.68
	30,	3.28
	25,	16.00
	30,	94.21
Oct.	6,	2.25
	11,	4.61
	27,	3.48
Nov.	5,	11.90
	10,	9.14
	21,	5.73
	18,	7.78
	20,	37.50
	30,	6.00
Dec.	9,	14.71
	4,	28.42
	14,	10.05
	16,	3.63
254	1909	
	Dec. 10,	2.89
	15,	1.01
	1910	
	Jan. 28,	5.96
	13,	4.75
	13,	1.00
	15, Int.	2.05

580.96

Electric Appli-
ance Com-
pany's Ex-
hibit No. 1.

1909

Aug. 14, C/M

4.17

Nov. 4,

1.35

5.52

\$575.44

55 George Racky, doing business as Racky & Son Iron Works.

GEORGE RACKY, called as a witness on behalf of the claimant, Racky & Son Iron Works, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Testimony of
George
Racky.

Q. State your name?
A. George Racky.
Q. Are you one of the plaintiffs in this case?
A. Yes sir.
Q. Doing business as Racky & Son Iron Works?
A. Doing business as Racky & Son Iron Works.
Q. Do you know whether anyone ordered bolts, etc. to be furnished for the Naval Training Station job?
A. The Schott Engineering Company.
Q. What is that?
Mr. Hopkins: Schott Engineering Company.
Mr. Wyeth: Q. Have you got any orders?
Mr. Hopkins: Schott Engineering Company.
Mr. Wyeth: He thinks it is a verbal order.
Mr. Peffers: I don't know anything about those orders. I couldn't find anything about those.
Mr. Wyeth: You couldn't?
Mr. Peffers: No. That is correct, Schott Engineering Company.

256 Mr Wyeth: Q When did you get this order, about?

A The year 1909.

Q October?

A October—April.

Q In April?

A Yes.

Q And what did you do in regard to filling that order?

A I made the bolts, clamps and the bolts.

Q And did you make any shipment of them?

Testimony of
George
Racky.

A I made shipment to the Naval Station.

Q To whom?

A To the Schott Engineering Company.

Q Yes. And between what dates did you furnish those materials?

A Well, from the middle of April to about two weeks or three weeks after I started to make our shipments—

Q There was some later shipment, was there not?

A Yes, sir, there was a shipment in July and August.

Mr Peffers: 1909.

Mr Wyeth: 1909.

A 1909.

Q And what was the amount?

A \$389.55.

Mr Peffers: Is that the total?

Mr Wyeth: \$389.55.

A The total amount.

Q Have you computed the interest on that from August 16 1911 at 5 per cent?

A Yes, sir.

Q How much is the interest?

A \$34.09.

Q Making a total amount of how much?

A \$423.64.

257 Q Has that ever been paid?

A No, sir, it has not.

Q By anybody?

A No sir, it has not.

Mr Wyeth: I might offer in evidence this copy—is this copy of your ledger statement account?

A Yes, sir, it is.

Mr Wyeth: I offer that in evidence as Racky's Exhibit Which said Racky's Exhibit 1 is in the words and figures following, to-wit:

258

RACKY EX 1.

Racky Exhibit 1.

Schott Engineering Company,
Naval Training Station,
George Racky, doing business as Racky & Son Iron Works,
1909,

Apr. 23,	80 steel	8.00
" 30,	1000 clamps and Bolts,	350.00
July 31,	40 clamp and bolts,	14.00
Aug. 13,	30 " and "	17.55
		<hr/>
		389.55

259 It is admitted that the said amount, \$389.55 was due at the time of the commencement of this suit, and no part of the same has been paid and that the materials were used in the prosecution of the work by the Schott Engineering Company under the contract with the Government mentioned.

260

United States Equipment Company.

Testimony of
N. D. Freeman.

N. D. FREEMAN, a witness called on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Q What is your name?

A N. D. Freeman.

Q What relation do you sustain to the United States Equipment Company, Mr Freeman?

A I am Assistant Secretary.

Q How long have you been Assistant Secretary, about?

A Practically since its organization, about five years.

Q That is a company located here in Chicago, is it?

A Yes sir, Fisher Building.

Q Did you receive an order from W. H. Schott for the furnishing of certain cars and track and equipment of that character for use at the Naval Training Station on a job of W. H. Schott there?

A Yes sir, we did.

Q Is this a copy of the—

Mr Hopkins: Your question did not accurately define what was actually used there. It was the rental of plant.

Testimony of
N. D. Freeman.

Mr Wyeth: It was what?

Mr Peffers: It was the rental of certain cars.

Mr Wyeth: Q What was it? I think they will allow
261 you to state. What was it you furnished?

A They furnished six steel concrete cars, fifteen hundred feet of track and a couple of switches.

Q What was it used for there?

A I don't know what it was used for.

Q Well, what was the purpose of that? You know, don't you, in a general way?

A It was for hauling concrete.

Q On the cars?

A Yes, sir.

Mr Peffers: They got it back, didn't they, after the job was finished?

Mr Wyeth: Yes.

Mr Peffers: So that—

Mr Wyeth: It was received back by you later?

A Yes, sir.

Q Now, on what terms was that track and cars and equipment given to that job?

A We were to receive rent for the expired time between the date of shipment from our shops and date it was returned there.

Mr Peffers: What did he say,—rent was that?

Mr Wyeth: Rent, yes.

A Rent, yes.

Q How much rental?

A It was \$26.12 a month for the cars, \$15 a month for the track, and a small amount for the switches. \$42.82 a month for the entire lot.

Q And when did the service begin and when did it end? Can you state? Shall I let the jury—

262 Mr Peffers: Oh, yes, go ahead.

A September, 1908, it was shipped there and it came back in October, 1909.

Mr Wyeth: Yes.

Mr Hopkins: Thirteen months was it or twelve months?

Mr Wyeth: Well, it was back there in November.

Q What time was it received back?

A It was twelve months and a fraction I believe.

Q Yes, from September, 1908, beginning with September—

A Thirteen months and a fraction.

Q Yes, that account was paid, was it not, from time to time, until what date—or to put it short, what months of rental?

Mr Peffers: What is the balance of it?

A It was paid up to the end of June, 1909.

Mr Peffers: What is that?

A It was paid up to the end of June.

Mr Hopkins: What is the balance?

Mr Peffers: Up till the end of June, 1909.

Mr Wyeth: Up to the end of June, 1909.

Q And from the end of June, 1909, until the service was ended, what was the balance of rental, total balance?

A It was \$171.28, rentals.

Q And under the agreement was there anything with regard to the expense of transportation?

A He was to pay the freight from our shop to his and back again.

263 Q How much freight was there, if any, that he paid.

A It was \$21.11 paid on plant when it was returned to us, paid by ourselves.

Q By the U. S. Equipment Company?

A Yes.

Q That made a total of how much.

A \$192.39.

Q Has that ever been paid?

A No, sir.

Q And have you computed interest on that from August 16th, 1911, to date, at five per cent per annum?

A Yes, sir.

Q How much is that interest?

A \$16.00,—I guess that is on another memorandum there.

Q Oh, is this your memorandum on that? (handing document to witness.)

A Yes, sir. \$16.65.

Q Will you state what the total amount unpaid of interest and rental is?

A \$209.04.

Mr Wyeth: I suppose that was used during the time mentioned on the ground for the purpose of construction?

Mr Hopkins: By the Shott Engineering Company.

Mr Peffers: No. I will admit that up to January 1, it was used by Schott, and after that by the Schott Engineering Com-

Testimony of
N. D. Freeman.

pany, and his claim isn't any good because it doesn't contain items that they can recover.

Mr Wyeth: Well, we will see about that.

Mr Peffers: Well all right. You got back the plant, didn't you, after October—what was the date?

A It was returned in October.

264 Mr Hopkins: October, 1909.

A Last of October, 1909.

Mr Wyeth: Last of October, 1909?

A Yes, sir.

Mr Peffers: You got the plant back just as you sent it out there?

A We got the same plant back.

Q You got the same plant back. That is all.

Mr Wyeth: Q By "Use" of course you mean it was used in hauling work on the ground?

Mr Peffers: Oh yes.

Mr Wyeth: That is all.

Mr Peffers: I want to move to strike that claim out, if the court please.

The Court: I will consider that later.

Testimony of
Frank King.

265 Scott Valve Company.

FRANK KING, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr Wyeth, and testified as follows:

Q. What is your name?

A Frank King.

Q. Frank King?

A Yes sir.

Q Are you connected with the Scott Valve Company?

A Yes sir.

Q State whether the Scott Valve Company received these orders I now show you, numbers 4189, 4213, 4207, 4582, 4611 and 4011; did your Company receive those orders at or about their dates?

A Yes sir.

Q These are all in 1909?

A Yes sir.

Q Did the Scott Valve Company fill those orders?

A Yes sir.

Q In what way? That is, did you ship them or how?

A They were shipped direct from the factory, Detroit, Michigan.

Q Yes. And to whom?

A To Schott Engineering Company, some to Schott Engineering Company and some to W. H. Schott, I believe.

266 Q Yes. In accordance with the directions on the order?

A In accordance with the directions on the order.

Q Now, can you state what was the total amount of those goods that were delivered? Is this your memorandum?

A Yes sir.

Q Can you state what the total amount was?

A \$365.14.

Q Was there a credit made to bring it to \$365.14?

A Charged against the Schott Engineering Company.

Q What is that?

A It was charged against—

Q That is the amount, is it?

A That is the amount, \$365.14.

Q Has that been paid?

A No sir.

Q Whom did you charge that to?

The Court: Included interest on that?

A No sir.

Mr Peffers: You say it has not been paid?

Mr Wyeth: I want to get the right amount.

Mr Peffers: I got a credit memorandum of \$4.25.

Mr Wyeth: That brings it to what?

Mr Peffers: What is that amount?

Mr Wyeth: \$365.14, I think it is.

Mr Peffers: That is the credit here charged to Schott Engineering Company.

Mr Wyeth: Q Has any part of that been paid, or did

267 A No, it has not been paid.

Q And have you computed interest on it from August 16, 1911, to date, five per cent?

A Yes sir.

Q If so, state how much the interest is?

A \$63.89.

Q What is the total amount unpaid, with interest?

A \$429.03.

testimony of
Frank King.

Mr Wyeth: That is all.

Mr Peffers: Q You say that is all charged to Schott Engineering Company, don't you? Well, we will offer—

Mr Hopkins: If you can agree on that, there is no use putting it into the record.

The Court: Same stipulation, I suppose, that it was used on the work?

Mr Hopkins: Yes. That is all then, we don't care to cross-examine.

Mr Wyeth: I would like to introduce, however, the orders.

Mr Hopkins: I don't care.

Mr Peffers: I object to them unless it is stipulated that it was charged to the Schott Engineering Company.

Mr Wyeth: Well, the orders show that it is shipped to W. H. Schott, North Chicago. That is the only difference. The word "ship" I don't know whether it changes anything or not.

Mr Hopkins: No, no.

Mr Wyeth: Well, that is a fact. Do you admit that?

Mr Hopkins: What is that?

268 Mr Wyeth: He said they were shipped in accordance with the directions on the order.

The Court: He testified to that.

Mr Hopkins: Yes.

Mr Wyeth: I didn't introduce them. I want to introduce them to show—

Mr Hopkins: That is all right.

The Court: Let them in to show who they were shipped to.

Mr Wyeth: We offer the six orders of the Scott Valve Company in evidence. Mark them "Scott Valve Company's Exhibits 1, 2, 3, 4, 5, and 6.

Whereupon said orders so offered and received in evidence were marked "Scott Valve Company Exhibits 1, 2, 3, 4, 5, and 6," respectively, and the same are in the words and figures following, to-wit:

SCOTT VALVE CO. EXHIBIT 1.

Scott Valve Co.
Exhibit 1.

The Schott Engineering Company,
Chicago.

Requisition No. 4189 Chicago, June 23, 1909.

Messrs. Scott Valve Co.

231 E. Randolph St., City.

Please ship to W. H. Schott, No. Chicago, Ills.

Care Naval Station,

Via, C. and N. W. Ry.,

Please rush.

2-3" Mich. I. B. Bronze Mounted Auto Drip Valves,

10-4" " " " flge. frd.

2-5" " " " " "

1/2" Drip up to and including 4"

3/4" " all above, 4"

SCHOTT ENGINEERING COMPANY,

By M. O. PAYNE,

SCOTT VALVE CO. EXHIBIT 2.

Scott Valve Co.
Exhibit 2.

The Schott Engineering Company,
Chicago,

Chicago, July 9, 1909.

Requisition No. 4213

Messrs. Scott Valve Co.

Address, 231 E. Randolph St. Chicago

Please ship to W. H. Schott, North Chicago, Ills.

Care Naval Station,

Via C. and N. W. Ry.

At once.

1-3" St'd Sc'd Auto Drip Valve with wheel,

5-3" Do. " sq. Head.

(1/2" Drip.)

Note: Refer to "Articles from Gov. Specifications" copy
of which has been sent you.

SCHOTT ENGINEERING COMPANY,

By M. O. PAYNE.

Scott Valve Co. 270
Exhibit 3.

SCOTT VALVE CO. EXHIBIT 3.

The Schott Engineering Company,

Chicago, July 2nd, 1909

Requisition No. 4207

Messrs. Scott Valve Co.

Address 231 E. Randolph St. Chicago.

Please ship to W. H. Schott, North Chicago, Ills.

Care Naval Station,

Via C. and N. W. Ry.

Rush.

The list of valves hereto attached.

Note: Refer to "Articles" taken from Government Specifications. Copy of which has been sent you.

SCHOTT ENGINEERING COMPANY,
By M. O. PAYNE,

Scott Valve Co.
Exhibit 4.

SCOTT VALVE CO. EXHIBIT 4.

The Schott Engineering Company.

Chicago.

Chicago Nov. 4th, 1909,

Requisition No. 458

Messrs. Scott Valve Co.

Address 231 Randolph St. Chicago

Please ship to W. H. Schott, No. Chicago, Ills.

Care Naval Station,

Via C. and N. W. Ry.

At once, Rush.

2-3" Auto Drip Valves, sq. Head,

Same as previously furnished on same job.

Also x press 2 square heads to go on.

2-2" Auto Drip Valves, which you furnished, which did not have either sq. head or wheel.

SCHOTT ENGINEERING COMPANY,
By M. O. PAYNE.

271

SCOTT VALVE CO. EX. 5,

Scott Valve Co
Exhibit 5.

The Schott Engineering Company,
Chicago.

Chicago, Nov. 10, 1909.

Requisition No. 4613.

Messrs. Scott Valve Co.

Address. Chicago.

Please ship to W. H. Schott, No. Chicago, Ills.

Care Naval Station,

Via Am. x-press.

7- Sq. Heads for 3" Auto Drip Valves.

2-3" Auto Drip Valves with square head.

To conform with Auto Drip Valve which you have
been shipping to this job.

SCHOTT ENGINEERING COMPANY,
By M. O. PAYNE.

SCOTT VALVE CO. EX. 6.

Scott Valve Co
Exhibit 6.

W. H. Schott

Chicago

Requisition No. 4011

Chicago, Feb. 18, 1909.

Messrs. Scott Valve Co.

Address, 231 E. Randolph St. Chicago.

Please ship to W. H. Schott, No. Chicago, Ills.

Care Naval Training Station,

Via C. and N. W. Ry.

8-3" Std. Sed. Auto Drip Valves,

2-2 1/2" " " " "

Note. See letter and copy of x-tract from Gov. Spec. made
a part of this order.

SCHOTT ENGINEERING COMPANY,
By M. O. PAYNE.

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Charles A. Daniels, trading as Quaker City Rubber Com-
pany.

Testimony of
A. Romain.

A. ROMAIN, called as a witness on behalf of the claimant, Charles A. Daniels, etc., having been first duly sworn was examined in chief by Mr. McNitt, and testified as follows:

Q State your name?

A A. Romain.

Q What is your business?

A Manager of the Quaker City Rubber Company, or Mr. Daniels, trading as Quaker City Rubber Company.

Q Where do you live?

A 3594 Washington boulevard.

Q You are manager of the Chicago house of the Quaker City Rubber Company?

A The Chicago branch.

Q Has that company had any dealings with W. H. Schott or with the Schott Engineering Company?

A During 1909, with the Schott Engineering Company.

Q I hand you these documents and ask you what they are Mr. Romain?

A These papers are written orders received from the Schott Engineering Company; and attached to them are our shipping orders, from which we afterwards rendered 273 our bill.

Q Take the written orders that you refer to. How many of those have you there?

A Three.

Q And where did you get those three written orders?

A They are the memorandum.

Q From where?

A From the Schott Engineering Company.

Q What are those orders for?

Mr Peffers: Well, never mind. They speak for themselves. That is all right.

Mr McNitt: All right.

Q What are the yellow sheets we have here?

A The yellow sheets are our shipping room forms, from which the mail orders are written when they are received.

Q This was the original record?

A Our original entry, yes sir.

Q What is the other document you have?

A The written order from the Schott Engineering Company.

Q Well, then, we have another one here, receipts from the carrier.

Mr Peffers: Never mind the receipts, Mr. McNitt.

Mr McNitt: You don't care anything about those?

Mr Peffers: We don't care anything about that. It is all the Schott Engineering Company orders, and Schott
274 Engineering Company bills. The amount is Seven-hundred and some odd dollars. What is the total amount of your claim?

Mr McNitt: It is \$630.00, without the interest. I will have him compute the interest.

Mr Peffers: Have you got the invoices here?

Mr McNitt: Just a minute.

Q What are these, Mr. Romain?

A These are invoices, our invoices covering those shipments there.

Q You sent those to the Schott Engineering Company?

A Yes.

Q I mean these?

A Yes sir.

Mr McNitt: I will offer in evidence—

Mr Peffers: They are all charged to the Schott Engineering Company, aren't they?

Mr McNitt: Q They are all charged against the Schott Engineering Company?

A I think they are.

Q On your books?

A Yes sir. They were shipped to W. H. Schott.

Q They were shipped to W. H. Schott?

A They were shipped to W. H. Schott, and charged to the Schott Engineering Company.

Q Shipped to W. H. Schott at North Chicago?

A At North Chicago.

Mr McNitt: I will offer in evidence now, as Charles
275 A. Daniels, trading as Quaker City Rubber Company's exhibits 1, 2, and 3,—mark them. Also mark these other papers as exhibits 4, 5 and 6.

(The documents referred to were marked Daniel's exhibits 1, 2, 3, 4, 5, and 6.)

Mr McNitt: Q What is the total amount of your claim, Mr. Romain, of the claim of Charles A. Daniels?

A I could not tell offhand. \$680.00—

testimony of
A. Romain.

Q You have computed the interest there, have you? Here are the invoices.

A With the interest, \$685.49.

Q What is the total amount of the principal, without the invoices. You can figure without the invoices.

A \$630.33.

Q Have you computed the interest—you computed the interest from what date?

A From August 11th—

Q August 16th.

A August 16th, 1911.

Q To date?

A To date.

Q The interest amounts to how much?

A \$55.16.

Q That makes a total claim of how much?

A 385—no. \$685.29.

Mr McNitt: The same stipulation holds?

Mr Peffers: Yes, that this stuff was used by the Schott Engineering Company.

Mr McNitt: No. That this stuff was used in the work at North Chicago.

Mr Hopkins: By the Schott Engineering Company in 276 this work at North Chicago.

Mr McNitt: Is that the stipulation?

The Court: That is the same one that has been made. They would not admit any other.

Mr McNitt: That is the same one I want to use. That is all, Mr. Romain.

Mr Hopkins: That is all.

Mr Peffers: That is all.

Said exhibits are as follows:

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DANIEL'S EXHIBIT 1.

Daniel's
Exhibit 1.

"The Schott Engineering Company,
315 Dearborn Street,
Chicago.

Chicago, Nov. 20, 1909.

Requisition No. 4646.

Messrs. Quaker City Rubber Co.,

Address Lake St., Chgo.

Please ship to W. H. Schott—No. Chgo.,

Care Naval Station,

Via C and N. W. Ry.

Rush.

Apprx. 10 yds. 1/16" Ebonite sheet packing.

House No. 14,281.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE."

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DANIEL'S EXHIBIT 2.

Daniel's
Exhibit 2.

"The Schott Engineering Company,
1100—1126 American Trust Building,
Chicago.

Requisition No. 4352.

Messrs Quaker City Rubber Co.

Address Lake St., Chicago.

Please ship to The Schott Eng. Co., North Chicago,

Care U. S. Naval Station,

Via C & N. W.

10 yds 1/16" Ebonite sheet, Gasket Rubber.

House No. 12,346.

THE SCHOTT ENGINEERING COMPANY,
W. L. FOSTER."

Daniel's
Exhibit 3.

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DANIEL'S EXHIBIT 3.

"The Schott Engineering Company,
1100—1126 American Trust Building,
Chicago.

Requisition No. 4212 Chicago, July—
Messrs. Quaker City Rubber Co.,
Address, Lake St., Chicago.
Please ship to W. H. Schott, North Chicago.
Care Naval Training Station.
Via C and N. W. Ry.

At Once.

1600 Lineal feet of 5/8" Special Marine Packing put up on
spools of approx. 200# to the spool.

House No. 10,562.

THE SCHOTT ENGINEERING COMPANY.
By PAYNE."

Daniel's
Exhibit 4.

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DANIEL'S EXHIBIT 4.

Quaker City Rubber Co.

C. A. Daniel, Proprietor
Manufacturers of

Mechanical Rubber Goods, Belting, Hose, Packings,
Moulded Goods, Etc.,
629 Market Street,

Chicago, Aug. 14th, 1909.

Order No. 4212

Req. No.

Sold to Schott Engineering Co.

American Trust Bldg.,

Chicago, Ills.

Terms: 2% 10 Net 30 days Shipped via: Frt.

F. O. B. Chicago.

1600 Lineal Ft. 5/8" Special Marine P P P Pkg.

744 Lbs at 1 25 930 00

Less 40% 558 00 55' 00

Shipped to W H Schott

North Chicago Ills."

DANIEL'S EXHIBIT 5.

Daniel's
Exhibit 5.

"Quaker City Rubber Co.

C. A. Daniel, Proprietor,
Manufacturers of

Mechanical Rubber Goods, Belting, Hose, Packings,
Moulded Goods, Etc.
629 Market Street.

Order No. 4352 Chicago, Sept. 14th, 1909.

req. No.

Sold to Schott Engineering Co.

American Trust Bldg.,

Chicago, Ills.

Terms: 2% 10 Net 30 Days Shipped via: Express.

10 Yds 1/16 Ebonite Sheet P 53 Lbs at 65

34 45 34 45

Expressed to U S Naval Station
North Chicago."

DANIEL'S EXHIBIT 6.

Daniel's
Exhibit 6.

"Quaker City Rubber Co.

C. A. Daniel, Proprietor,
Manufacturers of

Mechanical Rubber Goods, Belting, Hose, Packings,
Moulded Goods, Etc.,
629 Market Street,

Chicago, Nov. 29th, 1909.

Order No. 4646.

req. No.

Sold to The Schott Engineering Co.

315 Dearbornt St.,

Chicago, Ills.

Terms: 2% 10 Net 30 Days Shipped via: Frt.

F O B Chicago.

10 Yds. 1/16 Ebonite Sheet Pkg. 50 1/2 Lbs.

at 75

37 88 37 88

Shipped to W. H. Schott No Chicago Ill

283 Commonwealth Edison Company.

It is admitted in evidence that the Commonwealth Edison Company, in December 1909, sold and delivered certain conductors and cables to the Schott Engineering Company for use by the Schott Engineering Company under the Schott contract with the Government in the amount of 74.04, which was over due at the time of the commencement of this suit and that no part of the same has been paid; that the materials were shipped consigned to W. H. Schott as directed in the orders for said materials and that the same were used in the prosecution of the work under the Schott contract with the Government.

284 United States of America	} May 20, 1913
<i>vs</i>	
Illinois Surety Company	2:00 P. M.

(The following testimony was taken and proceedings had upon the hearing of the claim of the F. Bairstow Company.)

Testimony of
Charles
Bairstow.

CHARLES BAIRSTOW called as a witness on behalf of the claimant F. Bairstow Company, being first duly sworn, was examined in chief by Mr. McKenzie, and testified as follows:

Q Will you state your name and residence, please?

A Charles Bairstow, Waukegan.

Q In December—in 1908 what was your relationship to the F. Bairstow Company in a business way?

A I had charge of the books in the office.

Q At that time did you have any negotiations or transactions with reference to delivery of material to the Naval Training Station?

A Yes sir.

Q Was that material purchased on written orders—written contract, or by oral orders?

A Why some of it, we had orders, and some we did not. Most of the material was ordered by telephone, and a confirming order followed up.

Mr Hopkins: A confirmatory order followed?

285 A Yes sir.

Mr McKenzie: Q You have made a search for all of the orders you have?

A I have looked all through. There is a good many orders that are missing.

Q I hand you here an order dated December 28, 1908, from W. H. Shott, an order dated January 28, 1909, from the Schott Engineering Company, and an order dated December 28, 1909, from W. H. Schott,—all directed to the F. Bairstow Company,—and I will ask you whether these are part of the orders that you received?

A Yes sir. These are the confirming orders—two of them.

Mr McKenzie: I offer these in evidence and ask that they be marked Bairstow exhibits 1, 2, and 3.

Mr Peffers: Did you offer these orders?

Mr McKenzie Yes.

Mr Peffers: I object to these, if your Honor please.

Mr Hopkins: I object until we have an opportunity to cross examine on them.

The Court: You have offered them. Cross examine later.

Mr McKenzie: Is there an entry in your books—the first entry in your books is September 15, 1909, isn't it?

A That is not the first entry on the books. That is the first entry on the bill. There are some entries previous to that which are paid for.

Q Will you please read that entry?

Mr Hopkins: September 15, that is, 19—what?

286 Mr Peffers: '—9.

A September 5, 1909. W. H. Schott, 2 pieces of 4 by 4 T's.

Mr McKenzie: What is the amount?

A 50 cents.

Q Another, September 21st.

A W. H. Schott, 1 12 inch elbow, \$1.25.

Q 24th?

A W. H. Schott, car of cement, \$340.00.

Q October 9th—

Mr Peffers: Wait a minute. Go ahead, that is all right. September 24th, what is that?

Mr McKenzie: Yes.

Mr Peffers: 1909.

Mr McKenzie: Yes.

A September 24th, 1909, yes sir.

Mr Peffers: All right.

Testimony of
Charles
Bairstow.

Mr McKenzie: October 9th?

A October 9th, W. H. Schott, Company, car of cement
\$391.00.

Q October 16th?

A W. H. Schott Company, \$2.00.

Mr. Hopkins: W. H. Schott Company you say?

A Yes sir.

Mr Hopkins: What is that, the Schott Engineering Com-
pany?

A W. H. Schott Company.

Mr Peffers: That is not the name.

Mr McKenzie: He is reading the entries, senator.

287 Mr Peffers: It don't show what the item is, you have
not shown that.

A For use of a wagon, \$2.00.

Mr Peffers: That we object to, use of wagon, \$2.00.

Mr McKenzie: Well, go ahead; November 3.

A November 3d,—

The Court: That is objectionable of course.

Mr McKenzie: Well, if—

Mr Peffers: I am saying the principle of it—it is only
\$2.00, but I want to save the principle, that is all.

Mr. McKenzie: November 3d?

A November 3d, W. H. Schott Company, use of wagon
\$2.00.

Q November 9th?

A W. H. Schott, 6 pieces of 4 by 4 T's, \$1.50.

Mr Peffers: November what?

Mr McKenzie: That is the 15th, is it?

A That is November 15th.

Q Look at November 9, November 9.

A November 9, W. H. Schott Company, car of cement
\$382.00.

Q \$382.50, isn't it?

A \$382.50, yes sir.

Q November 24th?

A November 24th is just Schott, no initial on it, \$3.00.

Q What was the item?

A Half a ton of coke.

Q December 6th?

288 A W. H. Schott Company, use of the wagon \$3.50.

Q The 11th?

A W. H. Schott, 2300 pounds of coke \$6.90.

Mr Hopkins: That is not all there is to that.

A Right there, yes sir.

Mr Hopkins: Well, what is the balance of it, you have not put that in.

A This says his man got it, that is all.

Mr McKenzie: 20th?

A Schott Engineering Company, 2200 pounds of coke got by their man, \$6.60.

Q The 30th—

Mr. Hopkins: Where is that?

A Right here. W. H. Schott, half a ton of coke, \$3.00.

Mr McKenzie: That is the last entry?

A Yes sir.

Q What is the total of those?

A The total was \$1143.75.

Q Do your books show any credits?

A Yes sir. It shows credits for freight on the three cars of cement, that I wrote off, a credit of 1600 empty sacks, and check for \$216.43.

Q Making a total of how much?

A Total of \$515.68, which leaves a balance of \$628.07.

Q That is the naked balance?

A Yes sir.

Q Have you figured the interest on that sum from August 16, 1911, at five per cent, to May 20, 1913?

289 A \$55.70.

Q Making a total of how much?

A \$683.77.

Q Did you have any conversation with Mr. Schott with reference to sale of material to the Naval Training Station?

A Not personally, no.

Mr McKenzie: I have just learned, your Honor, that F. Bairstow, the claimant here, has died since this intervening petition, or this claim was filed, and we shall have to amend the claim during the course of this trial. I take it there will not be any objection to that.

That is all.

Cross-Examination by Mr. Peffers.

Q Now, are you the bookkeeper for Mr. F. Bairstow?

A Yes sir.

Q Were you during the year 1909?

Testimony of
Charles
Bairstow.

A Yes sir.

Q Now, will you turn to that entry of September 24, 1909?

A Yes sir.

Q Now, how is that entered on your book there?

A W. H. Schott Company.

Q What?

A W. H. Schott Company, C. L. & S. E. car 601298, 200 barrels cement.

Q Have you got the order for that?

A No.

Q You know that was shipped on order, don't you, of the Schott Engineering Company?

A Yes sir.

290 Q Yes. Now, that was shipped—

A Well, I wouldn't—just a minute, I didn't understand you. Schott Engineering Company, I don't know it was shipped to the Schott Engineering Company, no.

Q I am asking you this: You got an order, didn't you, from the Engineering Company, in writing from the Schott Engineering Company for the car load of cement?

A No sir, I have not got it.

Q Number 4414, isn't that the fact?

A I haven't got the order.

Q You know that is the fact, don't you?

A No sir, I don't.

Q Have you looked to find out?

A Yes sir.

Q Have you looked to find the order?

A I looked through our files, and the only orders I can find are the three which were exhibited to you.

Q You say you can not produce the order for the car load of cement?

A No sir.

Q Can you produce any orders?

A No sir.

Q For those car loads of cement?

A No sir, I have not any order for the three cars. And to the best of my knowledge, the three cars were ordered on the telephone.

Q The only orders you can produce are these three orders here, one dated June 29, marked number 4200, of the

Schott Engineering Company, this one, 3990, and 291 this small slip?

A Yes sir.

Q These are the only three you can find?

A Those are the only three I can produce, yes sir.

Q Now, do you mean to say you did not get an order for three of these car loads of cement on identically a form the same as that numbered 4200?

A If I said we haven't got the orders, and I haven't got any knowledge of them.

Q Are you prepared to swear that there wasn't any such order as that made?

A I could swear I do not know of receiving any such order, yes sir.

Q Who received your orders?

A Why I generally received what come into the office.

Q Did you receive all of the orders?

A Why the orders were given to our yard. A good deal of this stuff was hauled out by Mr. Schott's own team.

Q This cement was not hauled out by any team, was it?

A No. I am talking about some of the others.

Q I am talking about the car loads of cement, now.

A All right.

Q Where did you look to see if you could find any of these orders?

A I looked through all of our files.

Q And you found no order?

A I found no orders except the three I have produced.

292 Q Do you ever remember of seeing a letter in the words and figures that are indicated on that carbon copy, order number 4414, signed the Schott Engineering Company, for a car load of cement?

Q No sir, I don't remember of seeing the order.

Q Have you looked to see if you can find that among your letters, or anywhere else?

A Yes.

Q And you can't find it?

A No. I might state on the bottom of this, it is an order confirming the verbal order to us by Thorpe; it was my recollection of the way we got the orders for the cars of cement.

Q That says by Mr. J. J. Thorpe our superintendent.

A Yes sir.

Q Isn't that the same man you have referred to on the bottom of that order (indicating)?

testimony of
Charles
Bairstow.

A Yes sir.

Q And you say that on your books, this September 24, 1909 shipment of 200 barrels of cement is charged to the Chott Company?

A W. H. Schott Company, yes sir.

Q W. H. Schott Company. Is that the same with reference to the entry of October 9th?

A No sir, this entry here shows W. H. Schott Engineering Company.

Q You could not find any order for that?

A No sir.

Q Did you have anything to do with the shipping of 293 this cement?

A Yes sir.

Q Did you have the orders?

A Yes sir.

Q Well, could you find that kind of an order (indicating) or do you know anything about that, order number 4475.

A I couldn't find it in our files.

Q Well, isn't that the order which you shipped out that second car on?

A Why, to my best recollection, the orders were received over the telephone for all those cars of cement. They may have been confirmed afterwards, and they may not have been.

Q That order states that it confirms an order, doesn't it?

A Yes sir. It also says to ship to W. H. Schott.

Q And it also says, doesn't it, Schott Engineering Company?

A Yes, it says ship to W. H. Schott, who we were doing business with.

Q Wait a minute.

Mr Hopkins: I move to strike out that last suggestion of the witness as not responsive.

The Court: It may be stricken out. That is the question we are trying out here.

Mr Hopkins: That is the question we are trying here, but that was not responsive to anything we asked.

The Court: No, that is the reason.

Mr Hopkins: It is not for him to determine. We will talk to your Honor later.

294 The Court: It is for the jury to determine.

Mr. Peffers: Q Now, do you remember this order for carload of cement, number 4585?

A No sir, I haven't any record of the order.

Q Do you recognize that as a bill,—any of your bills for at shipment on September 24th?

A Yes sir.

Q That is the bill that you rendered?

A Yes sir.

Q Do you remember that bill of October 9, 1909, for a carload of cement to the Schott Engineering Company?

A That is on our stationery, yes sir.

Q Isn't it the bill which you rendered to the Schott Engineering Company?

A I presume so.

Q Then don't you know that is so?

A Well—

Q You haven't any doubt about it, have you?

A I don't know. I don't know that it isn't, but I haven't any doubt.

Q Did you make out that bill?

A I couldn't say. It is made out on the typewriter. I couldn't say whether I did or the stenographer did.

Q That is your typewriter, isn't it?

A I wouldn't be certain as to that, no.

Q Nor that bill? Is that the bill of the F. Bairstow Company?

A That is our bill-head, yes sir.

Mr Peffers: Mark those Defendant's Exhibits 1 and 2 for identification. Mark this for identification, 95 exhibit 3.

(The documents were marked as requested.)

Mr Hopkins: I want to look at that book.

Mr Peffers: Mark that Defendant's Exhibit 4 for identification.

Mr McKenzie: Order number 4414.

(The document was marked as requested.)

Mr Peffers: Mark this book exhibit 5; number 4585.

(The book was marked as Exhibit 5.)

Mr Hopkins: Take this book. Had you finished with the witness?

Mr Peffers: Yes.

Mr Hopkins: Take this book please, and state if it is not a fact that the charge on the 21st of September, 1909,

Testimony of
Charles
Bairstow.

was to the Schott Engineering Company? I will give you the paper if that will help you any.

A September 21, 1909?

Q Yes.

A Our book shows it to the W. H. Schott Company.

Q Schott Company?

A Yes sir.

Q The 24th, charge of \$340, that is to the Schott Company?

A Schott Company.

Q Schott Company or Schott Engineering Company?

A W. H. Schott Company.

Q On October 9th, charge of \$391, that was made to the Schott Company was it, and not to the Schott Engineering Company?

296 A That was to the W. H. Schott Engineering Company.

Q Yes. And the other small items are \$2, \$4, \$1.50, after that. All of those charges are sums that were charged to the Schott Company were they not, on your books?

A I can only refer to two of them now.

Mr Peffers: There is another one.

Mr Hopkins: Three.

Mr Peffers: November 9th, is another one.

Mr. Hopkins: Yes, November 9th.

A W. H. Schott Company.

Mr Hopkins: Yes.

Mr Peffers: That takes the three cars—

Mr Hopkins: That takes in three cars of cement. They aggregate—how much do those three items aggregate?

A \$1113.50.

Q Yes. That is all.

Mr Peffers: Mr. Bairstow, you shipped material, didn't you, to the Central Trust Company?

A Yes sir.

Q As Trustee of the Schott Engineering Company?

A Yes sir.

Q Didn't you?

A Yes sir.

Q That was during 1910?

A Well, it was shortly after the last date—that is, the date of December 30th, 1909, was the last date we have
297 on our bill here; the Central Trust Company's account came right on after that.

Q Have you the orders received from the Central Trust Company of Illinois, as trustee of the Schott Engineering Company—I mean your orders?

A Well, I have got some of them here. I don't know as paid particular attention to bringing any of those in particular down here. I find there is two of them here though. There may be more of them here.

Q Yes. That is all you have?

A Unless there is some more in Knapp & Campbell's office?

Q What are those others you have here?

A Those are the files.

Q Have you got any more here?

A Not here, no. I don't know how I happened to have those in this file; they happen to be here.

Q Can you produce, Mr. Bairstow, here tomorrow, the balance of these orders from the Central Trust Company as trustee of the Schott Engineering Company?

A I presume we can.

Q Produce them.

A We have the file we put those into, and I think we can find them.

Q You keep those, and bring in tomorrow the rest of your orders just like that, orders from the Central Trust Company.

That is all.

98 Mr Hopkins: Q You have stated that those three different carloads of cement that you shipped were barged to the Schott Company?

A W. H. Schott Company, yes sir.

Q W. H. Schott Company. Now, do you remember when the Schott Company or Schott Engineering company went into bankruptcy?

A Yes sir.

Q Yes. Did you receive a letter from Mr. Hugo Pam, representing the trustee in bankruptcy, on the question as to whether they should go on and complete the building up here under the directions of the court?

A Why, we had some correspondence from two or three concerns. I don't know whether that was—I don't recall whether that was one or not.

Mr Hopkins: Where is that letter of Hugo Pam's?

Mr McKenzie: If the Court please, it seems to me this question, and the letter in connection with it, is immaterial, as to whether or not he consented to the receiver completing

Testimony of
Charles
Bairstow.

that job. I can not see that that is in any way material to the issues in this cause.

Mr Hopkins: Well, produce the letter, and then we can see whether it is or not.

Mr McKenzie: I do not believe we should be required to produce it.

Mr Hopkins: Hugo Pam sent out a letter to each one of the creditors, and made a report to the court.

The Court: And he was attorney for—

299 Mr Hopkins: He represented the receiver, or trustee in bankruptcy, or the Schott Engineering Company; and by direction of Judge Landis, he sent out a letter, to see whether the creditors of the Schott Engineering Company wanted to complete the building or not. And this company was one of the parties that received that letter. And these shipments were made after that.

The Court: You want to show those creditors who assented to that.

Mr Hopkins: Yes, I want to show this is one of the creditors that assented to that, and show the shipments which were made.

Mr Peffers: This is a copy of the circular.

Mr Hopkins: Here is—I don't know whether your Honor has ever seen that or not, but this is a letter that was sent out by Pam & Hurd, to each one of the creditors.

The Court: Did you set this up in one of your pleas?

Mr Hopkins: Yes sir. That was set up in the pleas?

Mr Peffers: Oh yes, yes. A copy of the letter—

Mr McKenzie: We do not want to exclude that, if your Honor thinks it is in any involved in this case.

The Court: I don't know whether it is material or not, but I think they are entitled to prove, on their theory of any aspect of the case.

300 Mr Hopkins: The letter I want to show this witness and see if he received a copy of this letter.

The Court: Ask him.

Mr Hopkins: I will ask you if you did not receive a copy of a letter—

Mr McKenzie: We understand this is subject to our objection.

The Court: Yes, objection overruled.

Mr. Hopkins: —addressed to your firm, headed "To the creditors of the estate of the Schott Engineering Company, and signed by Pam and Hurd, in which they made this statement

ment: "The Central Trust Company of Illinois was appointed receiver of the Schott Engineering Company on January 14, of this year. As you well know, the chief assets of this company consisted of contracts in the course of completion with various persons and corporations for lighting, heating and power systems. In order to secure to the creditors the benefit of any profit there may be in these contracts, the receiver here offers to continue the business of the Schott Engineering Company sufficiently long to make such investigation of the various contracts so it could intelligently report to the court on the question of whether or not it will be to the best interest of the creditors of the estate to continue with any or all of them. Such investigation"—

Mr McKenzie: Just a minute. It seems to me counsel ought not to read that three page letter into the record. Let the witness read it and say whether he received it.

The Court: Have you got the original letter?

Mr Hopkins: No, it is a copy.

Mr McKenzie: I have got the original.

The Court: Show that to the senator.

Mr Wyeth: Senator, it was the same that every one received.

Mr Hopkins: It is the circular letter.

Mr McKenzie: Circular letter.

The Court: You want to test his recollection.

Mr Hopkins: Yes, I think I have read enough.

The Court: Do you remember it?

A I might say, before you go any further, if you want to save time, I havent any recollection of such a letter. However, I did not have charge of all incoming mail. F. Bairstow was there at that time, and it may be that he received such a letter, but he received it without my knowledge. In fact, he was the one that started to turn the papers over in the beginning on this suit. I am not prepared to say that we—

302 The Court: You can show that you mailed the letter.

Mr Hopkins: Yes.

The Court: To certain creditors.

Mr Hopkins: Yes.

The Court: And their names.

Mr Hopkins: We have got to rely upon Judge Pam, who is now on the Circuit bench, who was the lawyer who had it in charge, and made the report to Judge Landis, and stated

Testimony of
Charles
Bairstow.

that all of the creditors excepting 162 had responded to that.

The Witness: If we received such a letter and responded you would have a record of it.

The Court: You may prove it that way, or easier than try to prove it that way—

Mr McKenzie: It seems to me, the recital of the contents of the letter at this time should come out of the record. He read a large part of it in that question there.

The Court: I will let it stand subject to your objection.

Mr Peffers: What will we do about proving the letters that took place between Bairstow and the Trust Company?

Mr McKenzie: We will admit they purchased the material.

Mr Peffers: I will ask you to produce all of the correspondence, you havent done so.

Mr McKenzie: If you have any objection to using carbons—

303 The Witness: I did not understand you wanted the correspondence that took place after the trust company—

Mr Peffers: We furnished copies of the letters passed between the trustee in bankruptcy and this firm in regard to buying and selling stuff on behalf of the Schott Engineering Company, I have got the carbons here; the originals are in their possession.

The Witness: I will state, we have got orders from the Central Trust Company for material and delivered it. I can tell by the books how much.

Mr Peffers: If you cant identify it by those, then I will have to have the originals. I want to save you all of the trouble I can.

Mr McKenzie: If you want all of this correspondence in, I guess we will let it go in. Look right over and see whether you think that you need it.

The Court: I suppose the material that was furnished to the receiver or trustee was paid for.

Mr Peffers: Oh yes, no question about that.

Mr Hopkins: Yes.

Mr Peffers: This shows, pursuant to this circular, what they did.

The Court: You want to show the creditors now.

Mr. Peffers: Yes.

The Court: That the Schott Engineering Company was doing that.

Mr Hopkins: Yes. Has your Honor seen this letter?

The Court: Just your reading it, that part of it there.

(Counsel handed letter to the court.)

Mr McKenzie: If the court please, we object to this, not on the ground they are carbon copies, but for the reason they are immaterial, not relevant to any of the issues in this case.

The Court: They may be received subject to objection. Do you want to offer them?

Mr Peffers: Yes. Mark that defendant's exhibit 6.

(Marked as requested.)

Mr Hopkins: Now, when you leave the stand, will you go back to your place of business, and will you see if you can find a letter that you received from Messrs. Pam and Hurd, and the one I read, and the reply that was made by the firm of Bairstow to that?

A Yes sir.

Q And produce them here in open court, will you?

A If I can find it.

Mr McKenzie: Just a minute. We have such a letter.

Mr Hopkins: A copy.

Mr McKenzie: We have a copy. We have had it all of the time. But he doesn't know anything about it. He can't testify to that. I had it in my hand here all of the time.

Mr Hopkins: Now, where is the answer?

Mr McKenzie: Just a minute, senator.

(Handing Mr. Hopkins paper.)

Mr Hopkins: If your Honor please, I want to mark both of these and have them offered in evidence, the letter and the answer of the party.

Mr Peffers: That is exhibit 7.

Mr Hopkins: Mark them, will you, exhibits 7 and 8.

(Documents marked as requested.)

Mr Hopkins: These are offered in evidence in connection with the examination of this witness, if your Honor please.

Mr McKenzie: We object.

Mr Hopkins: The court has ruled on that.

Mr McKenzie: I haven't had any opportunity to object.

The Court: What is your objection?

Mr McKenzie: On the ground they are irrelevant and immaterial.

Testimony of
Charles
Bairstow.

The Court: They may be received subject to your objection.

(Which said letter marked Exhibit 7 "To the creditors of the estate of the Schott Engineering Company," addressed to the F. Bairstow Company, is in the words and figures shown by Defendant's Exhibit "A," hereinbefore set forth, being the circular letter sent out by the receiver The Central Trust Co.

306 Mr Hopkins: Now, this is the reply that was made by the firm represented by the witness on the stand. It is dated February 5, 1910, to the Central Trust Company, receiver of W. H. Schott Engineering Company.

(Which said letter last above referred to, so offered and received in evidence as aforesaid, was read to the jury by Mr. Hopkins and is in the words and figures following, to-wit:)

Defendant's
Exhibit 8.

307 DEFENDANT'S EXHIBIT 8.

"Feb. 5, 1910.

Central Trust Co.
Receivers W. H. Schott Co.
Chicago.

Gentlemen:

We are in receipt of your favor of the 1st covering the facts in reference to the creditors of The W. H. Schott Eng. Co.

From the statements you have made in your letter it would seem that the best thing for the creditors at large would be for the work to pushed through to completion, however we feel that the receipts from this particular job should be used to pay the bills that are outstanding on this particular contract but it will be best to complete the job whichever way the Judge rules on this particular point, providing the Admiral does not make it cost you more than you will get out of it as I know that there has not been anybody get out of there with very much to the good and I understand that there is some talk of charging The W. H. Schott Co. back with some of the fuel on account of the said Schott Co. not having the pipes properly covered and the claim is that it took more to heat the buildings. I merely mention this fact so you will know what to expect. However we would say to

complete this work. We would be very glad to hear from you as soon as the Judge has made his decision on the matter.

Defendant's
Exhibit 8.

Yours truly,

Signed F. BAIRSTOW

Colloquy of
court and
counsel.

308 Mr McKenzie: I move that those be stricken out for the further—for the reasons already stated, and for the further reason that there is nothing on here to show that Bairstow any more than gave his opinion that this work ought to be completed.

The Court: Objection overruled.

Mr Hopkins: Is that all with the witness?

Mr McKenzie: Yes.

Mr Hopkins: Now, if your Honor please, on these items showed in the book, charged to the Schott Company,—I move to exclude that portion of the witness' testimony touching all of those claims, on the ground of their being incompetent, irrelevant and immaterial, and that the surety company, the Illinois Surety Company is not responsible for any material that was furnished, or any charges which were made against the Schott Engineering Company. Your Honor can hold that in abeyance, if you will that you want to, until we get along further in the case, or, we are prepared—

The Court: I think I will overrule the objection.

Mr Hopkins: What is that?

The Court: I think I will overrule the objection. Perhaps that will be one of the questions we will have to consider at the end of the case.

Mr Hopkins: Very well, we except to the ruling.

309 The Court: That objection was made, in discussing the pleas, and we disposed of it on that theory.

Mr Hopkins: Yes, I remember. I looked last night over the opinion of your Honor on that, and we raised the point on that. Of course, the evidence went in without our seeing it in advance, and that is the reason I make the motion to exclude those items, that each and every item touching a claim against the Schott Company shall be excluded for the reasons stated.

The Court: Of course, as pleaded, it would seem as though the Illinois Surety Company primarily would not be liable for any act, or could not sustain any liability of any one except Schott, whose bond you went on.

Mr Hopkins: Yes.

Colloquy of
court and
counsel.

The Court: But there may be such privity between you and—

Mr. Hopkins: We are prepared any time your Honor wants to hear from us. We are prepared to satisfy your Honor there is not any. If you want to take it up now, we are prepared to argue it, and it might shorten the case, or we will abide by whichever course your Honor would prefer.

The Court: We will take a five minutes recess.

Mr. McKenzie: Just a minute.

The Court: I will let the jury go for five minutes.
(Short recess.)

310 Mr. McKenzie: I offer in evidence, Bairstow's exhibit number 3 for identification, being an order of the Schott Engineering Company to Bairstow, directing that the shipment be made to W. H. Schott, and signed Schott Engineering Company by W. L. Foster.

Mr. Hopkins: If you are going to offer it in evidence, put the whole page in.

Mr. McKenzie: I am going to offer it in evidence. I offer it and ask that a copy be substituted for the original.

Mr. Hopkins: That is all right.

Mr. Peffers: Order number 2.

Mr. McKenzie: It is order number 4475. As exhibit 4. I offer a similar order, number 4585 and ask leave to substitute a copy. Exhibit 5. And number 4414, and ask leave to substitute a copy. Have you got copies of all those.

Mr. Peffers: Yes.

Mr. Hopkins: Those being against the Schott Engineering Company, I object to their introduction on the ground of incompetency, irrelevancy and immateriality, and that they are against the Schott Engineering Company, which we have not bonded.

The Court: I understand, all of the evidence tending to show the Schott Engineering Company ordered any material you object to.

311 Mr. Hopkins: Yes.

The Court: That will be understood all of the way through then.

Mr. Hopkins: For the reasons that I have assigned it, and that will come up on further debate.

Mr. McKenzie: I am making the offer.

The Court: In that case, all that class of evidence will stand under your objection.

Mr. McKenzie: Here are these exhibits.

(Which said orders last above referred to, so offered and received in evidence as aforesaid, are in the words and figures following, to-wit:)

312

BAIRSTOW EX. 1.

Bairstow
Exhibit 1.

“Office of W. H. Schott, Engineer

American Trust Building, Chicago

Job No.

Date Dec 28, 09.

Mr. F. Bairstow,
Waukegan.

Please let bearer have the following goods and charge to
W. H. Schott, Engineer
American Trust Building, Chicago.

1/2 Ton Coke

No goods to be issued on this requisition unless signed by
Superintendent.

J. J. THORPE, *Supt.* ”

Bairstow
Exhibit 2.

313

BAIRSTOW EX. 2.

“ W. H. Schott

1100-1126 American Trust Building
Chicago

Requisition No. 3990

Chicago, Dec. 28 1908.

Messrs. F. Bairstow

Address Waukegan, Ills.

Please ship to W. H. Schott, No. Chgo., Ills.

Care Naval Station.

Via. Deliver.

17 pcs. 6" Sewerpipe

60 " 8" D.

Confining order.

Billed 12/28

Note!

Deliver no invoices to employees. Mail same to 1108 American Trust Building, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

W. H. SCHOTT,
By PAYNE.

BAIRSTOW EX. 3.

Bairstow
Exhibit 3.

The Schott Engineering Company

315 Dearborn Street

Chicago

Chicago, June 29th, 1909

Requisition No. 4200

Messrs. F. Bairstow,

Address Waukegan, Ill.

Please ship to W. H. Schott, No. Chicago, Ill.

Care Naval Station

Via Delivered

204 pcs. 4" Sewer pipe

2 " 6 x 4 Tee

5 " 4" Ells.

4 " 4" Curves

4 " 6" "

3 pcs. 6" Sewer pipe

2 " 10" "

(Confirming Thorp's Order.)

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE.

Bairstow
Exhibit 4.

315

BAIRSTOW EX. 4.

The Schott Engineering Company

315 Dearborn Street

Chicago

Chicago, Oct. 4, 1909

Requisition No. 4475

Messrs. F. Bairstow,
Address Waukegan, Ill.

Please ship to W. H. Schott, No. Chicago, Ill.

Care U. S. Naval Sta.

Via C. & N. W.

1 car Universal Cement Tested by Hunt & Co.

@ \$1.30 F. O. B. Naval Sta.

Confirming order of J. J. Thorpe

Note!

Deliver no invoices to employees. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By W. L. FOSTER.

BAIRSTOW EX. 5.

Bairstow
Exhibit 5.

The Schott Engineering Company

315 Dearborn Street

Chicago

Chicago, Nov. 5th 1909

Requisition No. 4585

Messrs. F. Bairstow,
Address Waukegan, Ill.

Please ship to W. H. Schott, No. Chicago, Ill.

Care Naval Station

Via

1 Car Universal Portland Cement (Hunt Test)

(\$1.30 for bbl. f. o. b. Naval Station)

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By PAYNE.

Bairstow
Exhibit 6.

317

BAIRSTOW EX. 6.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, 19.....

Requisition No. 4414
Sept. 21st, 1909.

Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:

Please ship us care of the U. S. Naval Training Station,
North Chicago, Ill.
1—car Hunt Test Universal Cement at \$1.30 per bbl. F. O. B.
Naval Station.

Very truly yours,

THE SCHOTT ENGINEERING CO.

WLF-S.

P.A.

This order confirms the verbal order of our Mr. J. J. Thorp,
Supt. of Construction.

Copy

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By

319 Mr. McKenzie: As to the use of this material on the job up there, I understood it was not necessary for us to produce our freight receipts.

Mr. Peffers: All used by the Schott Engineering Company, after the first of the year.

Mr. McKenzie: No, you do not ask us to prove that this particular material was used on the job.

Mr. Peffers: No, not used on the job, but admit it was

ed on the job by the engineering company after the first of
e year. Is that satisfactory?

Colloquy of
court and
counsel.

Mr. McKenzie: Yes. And before that, if any was used on
e job—

Mr. Peffers: I admit this stuff you have proved on the bills
ent into the job, and after the first of the year was used by
e Schott Engineering Company. Certainly. That is satis-
factory, isnt it?

Mr. McKenzie: Yes.

Mr. Hopkins: That the Schott Engineering Company is
he one that put it into the job.

Mr. McKenzie: I do not admit, of course, of record, that
he Schott Engineering Company put it into the job. All I
sk for is the admission it went into the job. We will find
ut later who it was put it in.

The Court: They admit that after January 2, it was put
in by the Schott Company. Call Mr. Maloney.

20 Mr. McKenzie: I wish the record to show also that
Mr. Schott personally scheduled the claim of F. Bairstow
or \$611.59 during the months of—it doesn't show here. It
don't show the years. Mr. Church wanted me to read some-
hing more.

Mr. Peffers: Wait a minute. I object to the offer of the
chedule of Schott, if the Court please.

The Court: Yes. Let it stand.

21 Defendant's exhibits, numbered 1, 2, 3 and 6 respect-
ively, relating to the claim of F. Bairstow, were there-
upon offered and received in evidence and were in the words
and figures as follows, to wit:—

22 (DEFENDANT'S EX. 1. BAIRSTOW.)

Defendant's
Exhibit 1—
Bairstow.

Voucher No. 730.

F. Bairstow
Waukegan, Ill.
"W. H. Schott Co."

Sept. 24, 1909.

200 Barrels cement, \$340.00

Defendant's
Exhibit 2—
Bairstow.

323 (DEFENDANT'S EX. 2. BAIRSTOW.)

Credit Memo.

Voucher envelope
800

Check No.

R. 1629.

Credit memo on bill of Schott Engineering Co. against F. Bairstow of Waukegan, Ill.,
for freight on car 60198,.....43.57
as per receipted expense bill attached.

Paid
Nov. 15, 1909.

Defendant's
Exhibit 3—
Bairstow.

324 (DEFENDANT'S EX. 3. BAIRSTOW.)

Voucher No. 862

F. Bairstow

Oct. 9, 1909.

Sold to

W. H. Schott Engineering Co.

200 Barrels cement @ 1.30,.....299.00

920 sacks .10..... 92.00

391.00

Defendant's
Exhibit 6.

325 DEF EX. 6.

April 20th, 1910.

Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:—

In Re: The Schott Engineering Co. Trusteeship.

Please deliver to A. L. Closterhouse, North Chicago, Ill. c/r
the U. S. Naval Training Station, at once,

20 barrels of Portland Cement as selected, invoicing the
same to the Central Trust Company of Illinois, Trustee The
Schott Engineering Company.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-S

26 Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:—

In Re: The Schott Engineering Co. Trusteeship.
Confirming verbal order to you from A. L. Closterhouse, you
will please deliver to him, 25 barrels of Portland Cement, in-
voicing the same to us.

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-S

May 20th, 1910.

27 Mr. F. Bairstow,
Waukegan,
Ill.

Dear Sir:—

In Re: The Schott Engineering Co. Trusteeship.
Please deliver at once to A. L. Closterhouse, North Chicago,
Ill., c/r the U. S. Naval Training Station,
10 barrels of Portland Cement,
invoicing the same to the Central Trust Company of Illinois,
Trustee, The Schott Engineering Company.

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-S

June 10th, 1910.

28 Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:—

In Re: The Schott Engineering Company, Trusteeship.
We have your invoice of May 19th, covering 40 sacks of
Universal Portland Cement, amounting to \$17.50. Having
paid former bills for cement received from you and having
return 423 sacks, for which you have rendered us credit mem-

Defendant's
Exhibit 6.

orandum, amounting to \$42.30, leaves you indebted to us to the extent of \$24.80, as per invoice enclosed.

Kindly send us your check to cover and oblige,

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, *The Schott Engineering Co.*
Per

P-S

329

F. Bairstow

Waukegan, Ill., July 6, 1910.

Central Trust Company of Illinois,
Trustee, *The Schott Engineering Co.*,
Chicago, Ill.

Dear Sir:—

Referring to your letter and invoice of June 10th, we will state that we issued you the credit memorandum for 180 empty sacks that were returned on May 19th. This being the number of sacks that we have sold to you since you took charge of the Schott Engineering contract.

The 243 empty sacks we have given credit to the Schott Engineering Company, as these sacks were some that we sold to them, but never received our pay for the same. We therefore, cannot allow you credit for them but have given the Schott Engineering Company credit direct and hope that this will be satisfactory to you.

We enclose you our check for fifty cents to cover the payment of the 180 sacks, less our invoice of May 19th.

Yours truly,

F. BAIRSTOW.

330

July 7th, 1910;

Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:—

In Re: The Schott Engineering Company Trusteeship:

We beg to acknowledge receipt of your favor of July 6th, enclosing check for Fifty Cents (50c), for which we will give you credit.

In reference to the 243 empty sacks which you say you have given The Schott Engineering Company, credit for and referring to our letter and invoice of June 10th, we beg to advise you that we cannot, under any circumstances, allow you to give The Schott Engineering Company credit for the 243

ks in question and apply it to your claim against The Schott Engineering Company, as you will readily understand it by so doing it makes you a Preferred creditor, which, under the bankruptcy statutes is unlawful and we must ask you to send us credit memorandum as Trustee of the estate of the Schott Engineering Co., and the same will be deducted from amounts which we, as trustee of the estate, are owing you on account of material purchased for the Naval Training Station, Great Lakes, North Chicago, Illinois. We will kindly ask you to give this matter your immediate attention, and thanking you in advance, we are,

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee for the Schott Engineering Co.
Per *Agent.*

O. P.—C.

31

F. Bairstow,
Waukegan, Ill., July 8, 1910;

Central Trust Co. of Illinois,

In Re: The Schott Engineering Co.

Gentlemen:—

We are in receipt of your favor of the 7th and contents noted. We will state that in as much as these bags were not sold to The W. H. Schott Co. but were just loaned to them for the use of the cement. Had they paid us for the same we would be glad to hand you a credit for the same but we believe under the circumstances that we are not placing ourselves as preferred creditors but are merely taking back the empty sacks that were loaned for the use of the cement.

Yours truly,
F. BAIRSTOW.

32

F. Bairstow
Waukegan, Ill. July 16, 1910;

Central Trust Company of Illinois,

Trustee for The Schott Engineering Co.,
Chicago, Illinois.

Gentlemen:—

We are in receipt of your favor of the 13th inst., with reference to the empty cement bags. When these bags were returned to us, we told your man at the Naval Station that we would take them and credit them to W. H. Schott, giving you as trustee, credit for the number of bags that you had bought from us.

Defendant's
Exhibit 6.

Inasmuch as these bags were sold to W. H. Schott but not paid for, we cannot consistently take them off of your hands, unless you will stand the freight, and expense of tying them up to be sent back to the mill. If this is satisfactory to you, we will allow you credit for the same less the expense above mentioned. If not, we hold the bags here at your disposal.

Yours very truly,
(Signed) F. BAIRSTOW.

333

July 19th, 1910.

Mr. F. Bairstow,
Waukegan, Illinois.

Dear Sir:—

In Re: The Schott Engineering Company Trusteeship:

Answering your favor of July 16th, regarding the cement sacks will say, it will be satisfactory to us to stand the freight and expense of tying them into bundles to send back to the mill. Whatever this amount is, you will deduct it from the amount covered by your credit memorandum and send us your check to cover and oblige,

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee for The Schott Engineering Co.
Per

M. O. P. C

Agent.

334

F. Bairstow

Waukegan, Ill., July 27, 1910

Central Trust Company of Illinois,
Trustee for The Schott Engineerig Co.,
Chicago, Ill.

Gentlemen:—

We are in receipt of your favor of the 19th inst., relative to the empty cement bags, and we enclose you our check for \$21.30 being the amount for the empty bags, less the cost of getting them from the Naval Station, counting and tying same up, and freight charges to the plant.

Very truly yours,
(Signed) F. BAIRSTOW.

335

July 30, 1910.

Defendant's
Exhibit 6.

Mr. F. Bairstow,
Waukegan, Illinois.

Dear Sir:—

In Re: The Schott Engineering Co. Trusteeship:

We beg to acknowledge receipt and thank you for your remittance of \$21.30 enclosed in your favor of July 27th.

Yours very truly,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee for The Schott Engineering Co.

Per

Agent,

M. O. P.—C.
Dictated.

336

July 13th, 1910.

Mr. F. Bairstow,
Waukegan, Ill.

Dear Sir:—

In Re: The Schott Engineering Company Trusteeship:

Replying to your favor of July 8th, we note that you say the cement sacks referred to were loaned to The Schott Engineering Company for the use of the cement. The fact in the case is that they were sold to The Schott Engineering Company, billed to The Schott Engineering Company, and the books of The Schott Engineering Company show the transaction.

We, as trustees of the estate of The Schott Engineering Company, you will well understand, cannot change these Debits and Credits of the bankrupt estate and the fact of your having taken these sacks back into your possession and making a claim that they were loaned, cannot be permitted under the Bankruptcy Statutes under any circumstances, because of the fact, as previously stated to you, in that event, you would be a preferred creditor which is unlawful.

We believe that our communications to you have been such that you understand the situation and we hope that you will appreciate our position and not put us to the trouble of taking further steps to secure the return of the sacks or a credit memorandum covering the same.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee for The Schott Engineering Co.,

Per

Agent.

M. O. P.—C.

337 H. W. Johns Manville Co.

Mr. Wyeth: Now, if your Honor please, we will present the claim of Johns-Manville Company, and while the files are here in the Schott Bankruptcy, I want to offer the proof of claim of the H. W. Johns-Manville Company of \$1723.98 in the individual bankruptcy of William H. Schott. Mark the Johns-Manville Exhibit 1.

Mr. Peffers: Why, if the court please, look at this Johns-Manville Claim, about 90 per cent of it is for claims in 1900. You don't want us to pay that, do you?

Mr. Wyeth: You don't know what you are looking at.

The Court: They will follow that up by proof.

Mr. Wyeth: We will get to it.

The Court: It is only offered now to save time.

Mr. Peffers: All right.

Mr. Hopkins: Well, it can go in subject to our objection the same as the others. The court allows that to go in.

Which document so offered and received in evidence was marked W. J. Johns-Manville Exhibit 1, and is in the following words and figures, to-wit:

H. W. Johns-
Manville Co.
Exhibit 1.

338 H. W. Johns-Manville Co.

EXHIBIT 1.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Northern Division.

In the Matter of
William H. Schott, } In Bankruptcy,
Bankrupt. } No. 17551.

United States of America
Northern District of Illinois
State of Illinois
County of Cook. } ss

At Chicago, in said Northern District of Illinois, on the 1 day of October, A. D. 1910, came Truman G. Younglove of Chicago, in the County of Cook and State of Illinois, and made oath and says that he is Manager and acting Treasurer of

H. W. Johns-Manville Company, a corporation, incorporated by and under the laws of the State of Illinois and carrying on business at Chicago, in County of Cook and State of Illinois, and that he is duly authorized to make this proof and says that the said William H. Schott, bankrupt, was at and before the filing of the said petition and still is justly and truly indebted to said corporation in the sum of \$2792.33, that \$731.28 of the consideration of said debt is as follows:

H. W. Johns-
Manville Co.
Exhibit 1.

Material delivered for use at the Naval Training Station under contract of W. H. Schott with Secretary of Navy, U. S. A. a copy of bond referring to same being hereto attached as Exhibit A; that no part of said debt has been paid and there are no set-offs or counter claims to the same; that said debt was due on the 1st day of February, A. D. 1910, and is evidenced and set forth in the statement hereto attached marked Exhibit B and made a part hereof.

That said debt consists of an open account of several items maturing at different dates except \$1000.00 evidenced by note of said Schott passed due and unpaid and owned and in the possession of H. W. Johns-Manville Co; that no judgment has been rendered thereon and that said corporation has not nor has any person by its order or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever, such as arises by virtue of said bond made part hereof as Exhibit A.

(Signed) F. G. YOUNGLOVE,
Mgr. and Acting Treasurer of said corporation.

Subscribed and sworn to before me this 11th day of October, A. D. 1910.

(Signed) GEORGE A. HERRICK,
Notary Public.

Seal

Endorsed, filed at 4:30 o'clock P. M. this 20th day of October, 1910. Frank L. Wean, Referee,

"Exhibit B."

340

"EXHIBIT B".

Chicago, Ill. Oct. 10, 1910.
27-29 Michigan Ave.,

W. H. Schott

Merchants Trust & Savings Bank Bldg.,
In account with H. M. Johns-Manville Co.

1907

For Mdse. as per invoice rendered,

Feb. 16,	80.92
Mar. 19,	26.25
" 23,	320.28
Apr. 16,	231.12
" 19,	7.13
July 10,	48.60
Sept. 6,	40.50
"	231.67

Note given Apr. 20th, 1907, at 60 days
for \$1000 with Int. at 6% protested,
June 19, 1907,

1208.33

Int. from maturity at 6% on outstand-
ing a/c due in 60 days,

138.74

\$2333.54

2333.54

1907

Cr. Memo.

July 24, 64.83

By cash,

Oct. 28, 207.66

272.49

272.49

2061.05Naval Training Sta. c/o
North Chicago,

731.28

2792.33

* * * * *

1 L. I. YEIDEL called as a witness on behalf of the plaintiff, having been first duly sworn, was examined in chief by Mr. Wyeth, and testified as follows:

Testimony of
L. I. Yeidel.

Q What is your name please?

A L. I. Yeidel.

Q Y-e-i-d-e-l?

A Yes.

Q Are you connected with the H. W. Johns-Manville Company?

A Yes sir.

Q In what capacity?

A Assistant credit Manager.

Q Do you know of the H. W. Johns-Manville Company receiving orders in 1909, from the Schott Engineering Company for a subway fuse box and other materials?

A Yes sir.

Q On the W. H. Schott contract job at North Chicago?

A Yes sir.

Q And do you know whether your company filled those orders?

A Yes sir.

Q And are you able to state about when they were filled? Is this a memorandum of this?

42 A That is a memorandum of our charges, yes.

Q Yes.

A We made shipments during June, August, September and November, 1909.

Q Yes. And to whom were they shipped; that is—you have here the bills of lading, have you, some of them?

A Yes.

Mr Hopkins: They were shipped to Schott on the order of the Schott Engineering Company, no use going into that.

Mr Wyeth: They were shipped on the order of The Schott Engineering Company to the naval station.

Mr Peffers: Yes, and charged to the Schott Engineering Company. It is all on their orders, if the Court please.

Mr Wyeth: Now, on that statement that you have before, you, that shows the amount of the bills, does it?

A Yes sir.

Q We will take that item of \$8.00, we will take that off, which was returned?

A Yes.

Testimony of
L. I. Yeidel.

Q That leaves how much balance?

A \$673.50.

Q \$673.50?

A Yes sir.

Q And the interest on that at five per cent from August 16, 1911, can you state that?

A Well, I can't without figuring it, no. I haven't taken the trouble to—

Mr Wyeth: I would like to have him state the amount in a moment,—change the amount a little.

343 Mr Peffers: While he is looking at that, now, it is understood, is it, that this stuff was all shipped on the order of the Schott Engineering Company—

Mr Wyeth: Yes.

Mr Peffers: —order numbers 4586, 4290 and 4109.

Mr Wyeth: Well, I have three of those numbers, and I presume they are right.

Mr Peffers: And charged to the Schott Engineering Company and used by the Engineering Company on the job.

Mr Wyeth: Well, as a matter of fact, it ought to be admitted here that their old books and ledgers were W. H. Schott, and that on the books they did not change it, that is all.

Mr Peffers: No, no. If you have got to go into that, I have got to go into detail. I don't see any point in it. The orders are here—

Mr Wyeth: Then, why do you ask the question? You asked me to whom they were charged.

Mr Peffers: Well, who is your claim against?

Mr Wyeth: The claim is against W. H. Schott and Illinois Surety Company.

Mr Peffers: Then, if you are going to have that—

The Court: I don't notice any distinction on the Schott Company ordering it.

Mr Wyeth: We can bring the ledger and those books 344 in.

The Court: And if you did it right along, that don't change the law of the case at all.

Mr Wyeth: Further than that we make no claim.

Mr Peffers: I know your Honor, but if a man orders stuff, they can't charge it to anybody else but him, I know that.

Mr Wyeth: There is no question about that.

Mr Peffers: If you will notice those orders--has the
part got them?

The Court: There is no need to do that.

Mr Peffers: All right.

Testimony of
L. I. Yeidel.

L YEIDEL recalled to the stand for further examination
by Mr. Wyeth, and testified as follows:

Q Mr. Yeidel, have you not computed the interest on the
L W. Johns-Manville Company--

A Yes sir.

Q --account from August 16th, 1911?

A Yes sir.

Q How much is that interest?

A The interest is \$58.93.

Q Making the total amount of the claim now, how much?

A Making the total \$732.43.

Mr Wyeth: That is all.

345 It is admitted that the materials were used in the
prosecution of the work by the Schott Engineering Com-
pany under the Schott contract with the Government and
also that the H. W. Johns-Manville Company received the
letter sent out by the Receiver from the Bankruptcy court
and that it also sold thereafter materials to the receiver for
use in the completion of the work under the said Schott con-
tract with the Government.

The following are the orders marked respectively, Johns-
Manville Exhibit 2, 3, and 4 introduced in evidence:

Johns-Man-
ville Ex-
hibit 2.

JOHNS-MANVILLE EX. 2.

The Schott Engineering Company
Chicago.

Chicago, Nov. 5, 1909,
Messrs. H. W. Johns-Manville Co.
Address Chicago, Ill.
Please ship to W. H. Schott No. Chicago, Ill.
Care Naval Station,

Requisition No. 4586

At once.

Fuses:

For Secondary Subway Boxes as per enclosed list.

Boxes originally ordered on Order No. 4109 your #5513.

14-5 Armp.	250 N. S. Fuses, Cut No.	2605
6-8	"	2607
3-10	"	2609
2-12	"	2610
3-20	"	2612
6-30	"	2614
18-40	"	2616
18-50	"	2618
27-60	"	2620
21-100	"	2657
3-150	"	2660
3-175	"	2661
3-200	"	2662
6-250	"	2664

THE SCHOTT ENGINEERING COMPANY,
By PAYNE

(JOHNS-MANVILLE EX. 3.)

Johns-Man-
ville Ex-
hibit 3.

The Schott Engineering Company

315 Dearborn Street

Chicago

Chicago, August 11 1909

Requisition No. 4290

Messrs. H. W. Johns-Manville Co.,

Address Chicago.

Please ship to W. H. Schott, North Chicago, Ill.

Care U. S. Naval Station

Via C. & N. W. Ry.

2 Bags (approx. 60 lbs.) Asbestos Sponge

@ \$160 per ton net or 8c lb.

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By W. L. FOSTER.

JOHNS-MANVILLE EXHIBIT 4.

Johns-Man-
ville Ex-
hibit 4.

The Schott Engineering Company

Chicago.

Requisition No. 4109

Chicago, Mch. 20, 1909.

Messrs. Johns-Manville Co.

Address Chicago.

Please ship to W. H. Schott, No. Chicago, Ills.

Care Naval Station,

Via C. and N. W. Ry.

The subway Fuse Boxes, as per attached list,

THE SCHOTT ENGINEERING COMPANY,

By PAYNE.

348 Moloney Electric Company.

Testimony of
Thomas O.
Moloney.

THOMAS O. MOLONEY, a witness called on behalf of the claimant Maloney Electric Company, being first duly sworn, testified as follows:

Direct Examination by Mr. Wyeth.

Q. Will you state your name?

A Thomas O. Moloney.

Q Where do you reside?

A St. Louis, Missouri.

Q Are you the president of the Moloney Electric Company mentioned in this case?

A Yes sir.

Q Do you know W. H. Schott?

A I do.

Q And the W. H. Schott Engineering Company?

A I know of them.

Q Did you receive what purports to be an order for materials with reference to the Naval Training Station, involved in this suit?

349 A Yes.

Q I have the original here. Is this the order that you received?

Mr. Peffers: What is the number of that Mr. Wyeth?

Mr. Wyeth: 4158.

A Yes, that is the order.

Mr. Wyeth: Well, we offer the order in evidence to be marked Maloney Exhibit 1.

Mr. Hopkins: Same objection.

Whereupon said paper was marked Maloney Exhibit 1.

Mr. Peffers: This one as it is marked in the bill of particulars is variant from the order if you want to correct that.

Mr. Wyeth: I will bring it out in a moment if you please.

Mr. Peffers: All right.

Mr. Wyeth: We have a copy of the invoice of the material that I would like to ask him about.

Q Is this a list of the goods shipped under that order? (Handing paper to witness)

A Yes, sir.

Q Where were they shipped to?

A They were shipped to W. H. Schott, care of the Naval Training Station North Chicago, Illinois, Great Lakes.

Q Do you know about what date?

A Shipped on October 6th or 7th, 1909.

Mr. Hopkins: Just a little louder. Can you hear?

A Juror: Not very well.

Mr. Wyeth: Shipped October 6th. I do not know if it is necessary, but we have the shipping receipt.

The Court: Q October 6th or 7th, 1909?

A 1909.

The Court: Yes.

Mr. Wyeth: We will put in anything that is necessary.

Q Is this the shipping receipt for those?

A This is a copy of the bill of lading.

Q Did your company receive that from the—

A Received this from the railroad company.

Q From the railroad company. Now Mr. Maloney take this (handing paper to witness) Can you state what was the amount of the invoice for those materials?

Mr. Peffers: Mr. Wyeth, I have the original invoice here.

Mr. Wyeth: All right.

Q Is this the original invoice, do you recognize the original invoice I now show you?

A Yes, this is the original invoice.

Q Now what was the amount of that invoice?

A \$6,625.

351 Q Was there any deduction from that for any reason?

Mr. Hopkins: It was on that order.

A Later on we allowed a deduction of \$14.

Mr. Wyeth: Q Did you receive a bill or charge from anyone for that deduction?

A Yes.

Q \$14 deduction, no dispute on it is there? Taking out the deduction of \$14, that was for labor and drilling?

A Yes.

Q Done by consignee, I presume, which left \$6,611, did it?

A That is right.

Q Now have you computed the interest on that from August 16th, 1911? I guess you have that here, marked on this (handing paper to witness). Have you computed the interest?

A I made the computation.

Q Very well, state what the interest is.

Testimony of
Thomas O.
Maloney.

A The interest from August 16th, 1911, to May 21st, 1913, is \$578.58.

Q And that makes a total of how much?

A \$7,189.68

Mr. Peffers: Mr. Wyeth I didn't get how you figured that?

Mr. Wyeth: From August 16th, 1911 to date.

Mr. Peffers: The commencement of the suit.

Mr. Wyeth: Yes, and that makes \$7,189.68.

352 The Witness: That is right.

Mr. Wyeth: Q Has that been paid?

A No it has not been.

Q You figured that at five per cent. did you?

A Five per cent.

Q Per annum?

A Yes.

Mr. Wyeth: Now I haven't offered these.

Mr. Peffers: All right offer them.

Mr. Hopkins: The evidence of this witness goes in subject to the objection that we made.

Mr. Wyeth: Very well. We will offer the original invoice in this case and ask that it be marked Maloney Exhibit 2, two sheets.

Whereupon said document was marked Maloney Exhibit 2.

Mr. Wyeth: Also the counter charge of \$14 Maloney Exhibit 3.

Whereupon said document was marked Moloney Exhibit 2.

Mr. Wyeth: There was no freight charges on these, you prepaid the freight?

A Yes, we prepaid the freight.

Mr. Wyeth: It is admitted as I understand these were used on the work by the Schott Engineering Company.

Mr. Peffers: Correct.

353 Mr. Wyeth: Q Now where and how did you receive this order that has just been offered in evidence?

Mr. Peffers: Oh that is objected to. That don't make any difference, how, when, or where he obtained it.

Mr. Wyeth: I want to show just what there is in regard to the charge and we will amend our bill of particulars accordingly. Just briefly. I don't think it is—

The Court: He may answer.

Mr. Wyeth: Q Where did you receive the order?

A I came personally to Chicago.

Q Whom did you meet here?

A Mr. Schott.

Q W. H. Schott?

A W. H. Schott.

Q Did he give you this order?

A After Mr. Payne made it out he handed it to me.

Q Did you have any conversation with him at the time?

A No.

Q You took it home with you to St. Louis did you?

A Took it home to St. Louis.

Q What if anything was said by you at the time that you received it from Mr. Schott or Mr. Payne, with regard to accepting it?

Mr. Peffers: I object.

A Not until later in the month—

Mr. Hopkins: Wait a minute. That is immaterial. The papers are here, the orders that have been filled.

54 The Court: Yes, that is immaterial.

Mr. Wyeth: We have a letter from them on the subject, we want to show that he did not agree to accept it at the time, that they then had some correspondence with regard to it, but I didn't wish to offer in evidence—

The Court: They afterwards furnished the material and it went into the job.

Mr. Wyeth: Yes.

The Court: They furnished it to the Schott Engineering Company.

Mr. Wyeth: Yes, we shipped it to Schott after receiving a certain letter which we will identify at least.

The Court: Very well.

Mr. Wyeth: Q Did you receive this letter which I now show you, along about its date, in due course of mail?

A Yes, we received this letter.

Q From whom?

Mr. Peffers: Let's see it.

A Well, it is written by the Schott Engineering Company and signed W. A. Schott.

Mr. Wyeth: Will you admit it is the signature of Schott?

Mr. Peffers: Why I think it is incompetent but if you want t—

The Court: Very well it is in subject to the objection.

55 Mr. Wyeth: Very well. The date of that letter is June 15, 1909, from W. H. Schott as president of the company and it is marked Maloney Exhibit 4.

Whereupon said document was marked Maloney Exhibit 4.

Testimony of
Thomas O.
Maloney.

Mr. Wyeth: Q Did you send any correspondence in answer to that letter?

A Yes, I answered the letter.

Q And is this a carbon copy of what you sent?
(Handing paper to witness)

Mr. Peffers: Have you got the original, Mr. Wyeth?

A Yes, this is a carbon copy.

Mr. Wyeth: Q Just a moment. I will show you another. Is that the original, that has been furnished me by counsel for the Surety Company?

A That is the original.

Mr. Wyeth: We will offer the original in evidence.

Mr. Peffers: All right. It is subject to our objection.

Mr. Wyeth: Subject to the general objection.

Mr. Peffers: Yes.

Whereupon said document was marked Maloney Exhibit 3

Mr. Wyeth: Q It was after that that you filled your order?

A What is that?

Q In October?

A Yes.

Mr. Peffers: Mr. Wyeth I have one letter in there 356 an original letter in which they dunned the Schott Engineering Company for the bill.

Mr. Wyeth: Well, as they did not pay it I don't need that.

The Court: I think we better leave this case to Mr. Peffers, he knows all about it.

Mr. Wyeth: I think that is so. I think Mr. Peffers ought to take a vacation, that is what I proposed the other day.

I think that is all.

Cross-Examination by Mr. Peffers.

Q Mr. Maloney you wrote this letter dated December 21st, didn't you, that is the original letter, signed by you?

A Yes.

Mr. Peffers: I wish you would mark that Defendant's Exhibit for Identification number 9.

Whereupon said document was marked Defendant's Exhibit 9.

Mr. Wyeth: What is that, the dun?

Mr. Peffers: That is the dun?

Mr. Wyeth: You didn't act on it.

Mr. Peffers: You asked us for it anyway.

357 This letter if the court please is dated December 21st, 1909 and reads as follows:

Which said letter was thereupon received in evidence and is in words and figures following:

Testimony of
Thomas O.
Moloney.

358

DEFTS. EX. 9.

Defendant's
Exhibit 9.

Moloney Electric Co.,

St. Louis, U. S. A. Dec. 21, 1909.

W. H. Schott Engineering Co.,
1100 American Trust Bldg.,
Chicago, Ills.

Gentlemen:—

During the first week in January, we will be called upon to make heavy payments for material which we have purchased, anticipating a rise in the Copper Market. To be able to meet these payments, it is necessary that we fortify ourselves, hence, we would ask that you favor us with payment of our invoice of Oct. 6th.

Trusting this matter will have your attention, and thanking you in advance for same, we are,

Yours very truly,

MOLONEY ELECTRIC Co.

T. O. MALONEY,

Pres.

359 Mr. Peffers: And the invoice that is offered by counsel is dated October 6th.

Mr. Wheth: I would like to read the letter of the 15th.

The Court: All right.

Mr. Wyeth: A letter from W. H. Schott to the Maloney Electric Company dated June 15th, 1909, which is as follows:

Which said letter is in words and figures following:

Moloney
Exhibit 4.

360

MALONEY EX. 4.

The Schott Engineering Company

Chicago, June 15th, 1909.

The Moloney Electric Co.,
St. Louis, Mo.

Gentlemen:—

The writer has just had an interview with your Mr. Mullin and he has advised us as to your instructions on the question of credit on the North Chicago order.

For your information will say, in the first place, the bond which we have on file with the Government, amounting slightly less than \$32,000.00 not only guarantees to the Government the completion of the work in accordance with the terms of the contract, but also the payment of all bills. The order given you is given you by The Schott Engineering Company which is amply able to carry out any contract taken by it, the goods being shipped to the writer personally due to the fact that the contract is being carried through in his name but the Company has been paying all bills since January first and receiving all benefits on account of contract. If you can get the goods out and make delivery so that they will be delivered at the Naval Training Station prior to the first of August, then in that case we will be allowed for the same on our August voucher which we will get somewhere between the 15th and 20th of August. Promptly upon receipt of our voucher from the Government you would receive check for your account, so that under the worst conditions your account would not run to exceed 40 days and probably would be

361 The Moloney Electric Co.,—2—

6-15-09.

cleared within thirty days.

If, upon shipment of the goods, you offer a sufficient amount of cash discount to make it a banking proposition, then in that case, the bill will be discounted.

We trust this advice will clear you on any point which you may have had in mind.

Thanking you for the courtesies extended, we beg to remain

Yours very truly,

W. H. SCHOTT
President

WHS-C.

362 Mr. Peffers: And his answer?

Mr. Wyeth: You have the original.

The Court: Read the copy if you have it.

Mr. Wyeth: He has the original. This is the letter of June 19, 1909.

Which said letter is in words and figures following:

363 MALONEY EX. 5.

Moloney
Exhibit 5.

Moloney Electric Co.

St. Louis, U. S. A.

June 19, 1909.

Attention Mr. W. H. Schott

Schott Engineering Co.,
Chicago, Ills.

Gentlemen:—

We have your favor of June 15th in regard to Mr. Mullen's call. Your letter entirely clears up the matter of credit and we will use our utmost endeavors to make delivery of the transformers on or before August 1st.

Thanking you for this business, we are,

Very truly yours,

MOLONEY ELECTRIC COMPANY,

T. O. MOLONEY,

Pres.

TOM/EG.

364 The foregoing exhibits, Moloney Exs. 1, 2, and 3, introduced in evidence, are as follows:

Moloney
Exhibit 1.

MALONEY EXHIBIT 1.

Chicago, June 7th, 1909

Requisition No. 415

Messrs. Maloney Electric Co.,

Address St. Louis, Mo.

Please ship to The Schott Eng. Co. W. H. Schott, North Chicago, Ill.

Care U. S. Naval Training Station

Via C. & N. W. Ry.

3—1 K. W. 2300 230-115 V. Transformers

6—1½ do. “

1—2 “ “

6—3 “ “

6—4 “ “

9—5 “ “

15—7½ “ “

9—10 “ “

18—15 “ “

All as per Gov. Specifications and requirements which have been submitted to you and on which your bid is placed.

Invoice in Triplicate

Orig. and Dup. with prices

Trip. without prices

\$6625.00 f. o. b. Naval Station, No. Chicago.

THE SCHOTT ENGINEERING COMPANY
By PAYNE.

Note:

Deliver no invoices to employees. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check “O” and ask instructions.

Make no back orders.

MALONEY EXHIBIT 2.

Moloney
Exhibit 2.

Moloney Electric Co.

Manufacturers of
Transformers for all Electrical Purposes.

St. Louis, Oct. 6, 1909.
Shipped to W. H. Schott Engineering Co.,
North Chicago, Ills.

der No. 4158 Shipped to All bills due on the 1st of the
Month, subject to sight draft on
15th if not paid.
r No. Via Wabash c/o C. and N. W. Ry.
Prepaid.

- 1 K. W. Type H. E. Subway Transformers,
#16325, 16326, 16327,
- 1½ K. W. Type H. E. Subway Transformers,
#16328, 16329, 16330, 16331, 16332, 16333,
- 3 K. W. Type H. E. Subway Transformers,
#16335, 16336, 16337. 16338, 16339, 16340,
- 2 K. W. Tupe H. E. Subway Transformer, #16334,
- 4 K. W. Type H. E. Subway Transformers, #16341,
16342, 16343, 16344, 16345, 16346,
- 5 K. W. Type H. E. Subway Transformers,
#16347, 16348, 16350, 16351, 16352, 16353, 16354,
16355, 16347, 16349, 16350, 16351, 16352, 16353,
16354, 16355,
- 7½ K. W. Type H. E. Subway Transformers,
#16356, 16357, 16358, 16359, 16360, 16361, 16362,
16363, 16364, 16365, 16366, 16367, 16369, 16370.

380

*Bill of Exceptions.*Moloney
Exhibit 2.

366

Exhibit 2 continued.

St. Louis, Oct. 6th, 1909.

Sold to W. H. Schott Engineering Co.,

Shipped to W. H. Schott, c/o U. S. Naval T. Sta.,
North Chicago, Ills.

Order No. 4158	Shipped to	All bills due on the 1st of the
Our No.	Via	month, subject to sight draft on
		15th if not paid.

Page #2

9— 10 K. W. Type H. E. Subway Transformers,
#16371, 16372, 16373, 16374, 16375,
16376, 16377, 16378, 16379,

18— 15K. W. Type H. E. Subway Transformers,
#16380, 16381, 16382, 16383, 16384, 16385,
16386, 16387, 16388, 16389, 16390, 16391,
16392, 16393, 16394, 16395 16396, \$6625.00

1150/2300 Volts to 115/230 Volts,

Complete with Oil, less cut outs,

Inv. OK'd

Oct. 12, 1909,

To Auditor.

Moloney
Exhibit 3.

367

MALONEY EXHIBIT 3.

"June 20/1909.

Credit Memorandum.

To Schott Engineering Company.

Credit invoice of Oct. 6—1909—a/c labor & drilling \$14.00

Total of invoice \$6625.00

Credit as above 14.00

Balance,	\$6611.00"
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United States of America }
 —vs— }
 Illinois Surety Company } Sanborn, J. and Jury.
 My 20, 1914.

The following proceedings were had on the hearing of the
 a of Nancy M. Watrous, doing business as G. B. Watrous
 ns).

JAMES A. WATROUS called as a witness on behalf of the Testimony of
 Plaintiff, Watrous, etc., having been first duly sworn, was James A.
 examined in chief by Mr. Wyeth, and testified as follows: Watrous.

Mr. Hopkins: What claim is this?

Mr. Wyeth: Nancy A. Watrous is the name.

Voice: Nancy M.

Mr. Wyeth: Nancy M; doing business as Watrous & Sons.

Voice: G. B. Watrous & Sons.

Mr. Hopkins: Nancy A. Watrous, doing business as G. B.
 Watrous & Sons.

Mr. Wyeth: Yes. Can we make this short?

Mr. Hopkins: What is it?

Mr. Wyeth: I understand, if I am not mistaken, that these
 the orders here, Mr. Smith.

What is your name?

James A. Watrous.

Where do you live?

A Waukegan, Illinois.

Q Do you know Nancy M. Watrous, doing business as
 G. B. Watrous & Sons?

A Yes, sir.

Where?

A At Waukegan, Illinois.

Mr. Hopkins: A little louder please.

A Waukegan, Illinois.

Mr. Wyeth: Yes. What business is she engaged in?

A In the hardware—

Q And was she in 1909?

A Hardware business.

Q What relation or connection do you have to that busi-
 ness, if any, and did you have in 1909?

A I was manager.

Mr. Hopkins: What?

Testimony of
James A.
Watrous.

A Manager.

Mr. Wyeth: Q Now, do you know W. H. Schott?

A Yes, sir.

Q And the Schott Engineering Company?

A Yes, sir.

Q And did you know of the work going on there in the Naval Training Station?

A Yes, sir.

Q Under a contract, by Schott?

A Yes, sir.

Q Now, did Nancy M. Watrous furnish any materials or anything for that job?

A She did.

Q In what way did you come to furnish the materials? Did you have charge of the business?

A Yes, sir.

Q Yes. In what way did you come to furnish the materials; that is, did you have orders, or how did it come about?

A We had some written orders.

370 Mr. Hopkins: A little louder.

A Beg pardon, I have got quite a cold today, I can't talk very loud.

Mr. Wyeth: He says he has a cold.

A We had some telephone orders, and some verbal orders, and some written orders, I believe.

Q How was the material delivered?

A By wagon, horses and wagon.

Q Have you the wagon receipts here?

A I think you have them.

Q Let me have some of the books here and maybe we can get along without those. Now, can you say when, under these orders, Nancy M. Watrous furnished any materials, and in what amount? Is this a copy of your account? When did you make the deliveries?

A September 1, 1909.

Q Yes. And how long did you continue to deliver materials?

A Well, up to and including January 11, 1910.

Q How much did it amount to? What was the price and value? How much is the total amount?

A The total amount of the account was \$379.85; \$379.85.

Q Is that unpaid?

A Yes, sir.

And have you computed the interest on that?

Yes, sir.

Q From August 16, 1911, at five per cent per annum?

A Yes, sir.

Q How much does the interest amount to?

\$34.82.

Mr. Hopkins: This is all subject to our objection, you understand.

Mr. Wyeth: Certainly. We understand that.

Q Making a total of how much?

A \$414.67.

Mr. Peffers: \$414, isn't it?

A \$414.67.

Mr. Wyeth: Yes, sir. I suppose you admit these were used the job?

Mr. Peffers: By the Schott Engineering Company, after September 1, 1909.

Mr. Hopkins: Yes, sir.

Mr. Peffers: The first shipment was the 1st, wasn't it, Mr. Wyeth?

Mr. Wyeth: September 1st.

Mr. Peffers: 1909.

Mr. Wyeth: Yes.

Q The last item there is January 11, for fifty cents, is it?

What did you say the date of the bankruptcy was?

Mr. Peffers: Why, about January 10, 1910.

Mr. Wyeth: Well, there is a little item of fifty cents that appears to be dated January 11th. Did you know anything about the bankruptcy proceedings, when that was delivered on January 11th? I don't know whether you did or not. I don't know as it makes any difference. No objection to that, so that I withdraw the question.

The Court: All right.

Mr. Wyeth: All I want on this question of furnishing to the trustee or receiver was all I cared to ask about. Any questions?

Mr. Hopkins: Is that all?

Mr. Wyeth: Yes. I thought I would offer the invoice, or ask him in a general way what the materials were.

Q What did these materials consist of; in general language, what was the line of it?

A The general line—the general range of building hardware.

Testimony of
James A.
Watrous.

Q Building hardware?

A Construction hardware.

Mr. Peffers: There is some gasoline there.

Mr. Wyeth: I see there is some gasoline in various places
What was that for?

A That was used for the gasoline engine; gas engine the
call it.

Q On the works?

A Yes sir, I believe.

Mr. Wyeth: That is all.

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Cross-Examination by Mr. Hopkins.

Q Mr. Watrous, you say you were the manager of this concern?

A Yes, sir.

Q What class of materials did you manufacture?

A I didnt say I manufactured anything. I said I was
manager of the business.

Q What was the character of your business?

A General retail hardware.

Q What?

A General retail hardware.

Q Now, you stated in the direct examination that you were
familiar with the Schott Engineering Company?

A I know of it.

Q What is that?

A I know of it, yes.

Q And when did you first know about the Schott Engineering
Company, how long before you commenced to ship to them
or let them have stuff? Six months?

A Well, I think it was in 1910 or 1909.

Q Dont you know that the work done on that Naval Training
Station was done by the Schott Engineering Company?

A I know that our account was started with W. H. Schott.

Q Who kept the account; did you personally?

A I personally kept part of it. My brother kept part of it.
We both worked on the books.

Q And were most of these orders verbal orders as you
say?

374

A I think so.

Q Do you know who Mr. Thorpe was that was the
at the station?

A Part of them from him and part of them from Closterhouse.

Q Part from what house?

A Part of the orders were from Mr. Closterhouse.

Mr. Wyeth: Closterhouse, that is what he said. He was the representative of the trustee.

Mr. Hopkins: Yes.

A He was with Schott, and afterwards with the Trust Company, I believe, as superintendent.

Q You continued to do business with the Receiver and trustee after the Schott Engineering went into the hands of the receiver, did you?

A Yes.

Q Yes. Now, these accounts here, do you know of your own personal knowledge they were called for?

A Yes, sir.

Q What?

A Yes, sir.

Q In whose handwriting is that letter (handing letter to witness)?

A That is my own.

Q That is yours?

A Yes, sir.

Q I will ask you if you received a letter from the Schott Engineering Company, of which that is a copy?

A I cant say positively, but I think we did, yes sir.

Q Is that a copy of the letter you received from the
375 Schott Engineering Company?

A So far as I know it is.

Mr. Hopkins: I want to read these to the jury. This letter is dated January 5, 1910.

Mr. Wyeth: Let me see them, Senator, just a moment.

Mr. Hopkins: Yes.

Mr. Wyeth: This is January 5.

Mr. Hopkins: This is in his own handwriting, on the 5th
and the 7th.

Mr. Wyeth: Do you offer all three of these?

Mr. Hopkins: Yes, I offer them.

Mr. Wyeth: We think they are immaterial and irrelevant to any subject I have heard of yet.

Mr. Hopkins: The letter of January 5th reads as follows—

Mr. Wyeth: Just a minute.

The Court: They may be read.

Testimony of
James A.
Watrous.

Mr. Hopkins: Yes.

Mr. Wyeth: They relate to some proposed meeting; and the answer is, "have you anything more substantial to offer?" What has that got to do with it?

Mr. Hopkins: They speak of themselves.

The Court: Objection overruled.

Mr. Hopkins: This letter is dated January 5, 1910. Exhibit 9.

(Which said letter was read by Mr. Hopkins in the words and figures following, to-wit):

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DEF EXH 9

May 20-1913.

January 5th, 1910.

G. B. Watrous Sons,
Waukegan,
Ill.

Gentlemen:—

Your statement of account of the 1st inst. with notation thereon is received.

We beg to advise you that there will be a Committee tomorrow afternoon, after which we will be able to advise you further financially.

Very truly yours,

THE SCHOTT ENGINEERING COMPANY,
Sec'y. & Treas.

CVK-S.

377 Mr. Hopkins: This letter is dated January 7, 1910, to G. B. Watrous & Sons, Waukegan, from the Schott Engineering Company. Exhibit 10.

(Which said letter was read by Mr. Hopkins in the words and figures following, to-wit):

78 DEF. EX. 10.

Defendant's
Exhibit 10.

May 20-1913

January 7th, 1910.

G. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:

As advised you the day before yesterday, the Committee and other friends interested in the very promising future of the Schott Engineering Company held an extended meeting, discussed the situation and the Committee enlarged its scope and interests by increasing its membership and they will immediately get together to formulate plans for the future, by which we hope to be able to clear up all of our temporary bills and enable us in the future to meet them more promptly. May we ask your kind consideration in the meantime and as soon as they have arranged matters, we will take pleasure in promptly advising you and if in the meantime we receive some of the moneys due us, which during this month should amount to over \$60,000.00, we will take pleasure in remitting and in the meantime, ask your continued consideration.

Very truly yours,
THE SCHOTT ENGINEERING COMPANY,
Treasurer.

CVK-S

379 Mr. Hopkins: This letter is to G. B. Watrous & Sons, dated January 14, 1910.

(Which said letter was read by Mr. Hopkins in the words and figures following, to-wit):

EXHIBIT 11.

Defendant's
Exhibit 11

"Waukegan, Illinois, January 14, 1910.

The Schott Engineering Company,
Gentlemen:

Your favors of the 5th and 7th were received and contents noted. Have you anything further to offer at the present time in a substantial form? We have certainly been very patient with you people, but our carrying capacity has its

estimony of
James A.
Watrous.

limit, and we would be very glad now to receive your check. Thanking you for a prompt response, in advance, we are,

Yours, etc.,

G. B. WATROUS & SONS."

Mr. Hopkins: Those exhibits are marked 9, 10 and 11.

Q This bill that we have here is the bill that you had under consideration, and this correspondence that I have just read?

A Yes, sir.

Q Now, you were advised, were you not, of the company going into bankruptcy and a receiver being appointed by
380 which the Central Trust Company became the receiver?

A Yes, sir.

Q Yes. Mr. Watrous, did you receive a letter from Mr.— from the firm of Pam & Hugo?

Mr. Peffers: Pam & Hurd.

Mr. Hopkins: Pam & Hurd.

A I think so.

Q Yes.

A To the best of my recollection.

Q Yes. Have you got a copy of the answer that you gave?

A I may have it at home in the files. I havent got it with me.

Q Well, in connection with that notice that you received from them, you consented to the receiver going on and completing the building, and you furnished these articles mentioned in those orders under that new arrangement, did you not?

Mr. Wyeth: Just a minute. We object as not cross examination, and on the further ground it is immaterial.

The Court: Overruled.

Mr Hopkins: Q That is a fact, isn't it?

A I didnt catch that question.

Mr Wyeth: I object to the form of the question, which includes a whole lot of things with regard to consenting to one thing and another, things that go in with the question.

Mr Peffers: That is to obviate the bringing of the letter.

If he brought the letter, we would not have had
381 that difficulty.

Mr. Wyeth: If he remembers what the letter is—

Mr. Hopkins: He remembers the letter.

The Court: Read the question to the witness.

(Question read)

A To the receiver.

Mr. Hopkins: That is correct, is it not?

A To the receiver, yes, sir.

Mr. Hopkins: We will offer this in evidence as exhibit 12.

Mr. Peffers: The itemized bill ought to go in.

Mr. Wyeth: I am going to offer it.

Mr. Peffers: There are several items of tools that ought to be stricken out.

The Court: That bill purports to be against Schott personally.

Mr. Hopkins: Purports to be against Schott.

Mr. Peffers: There are a number of specific items I might want to object to later.

Mr. Wyeth: We want to offer in evidence the invoice the witness has identified in his testimony of the goods and materials furnished by Watrous, as showing what the materials were, as well as the invoice price, and ask to have that marked Watrous' exhibit 1.

Mr. Hopkins: The additional objection to a lot of the items there, even if they had a case, they are not legitimate claims.

Mr. Hopkins: There are a lot of items there, which, if you had a claim, are not permissible. But that is a side issue, and can be taken up after the main question is settled.

Mr. Wyeth: If they object to any special ones, I think they ought to be objected to now.

Mr. Peffers: There are a lot of tools there, if your Honor please.

Mr. Wyeth: If you object to them, I will explain about the tools. They were used on the job. Under the decision of the courts, on this class of cases, a great many things that are not permanently incorporated in the property or works are nevertheless recoverable, because they are of that character that are necessary and are used in connection with the work, like gasoline.

The Court: Flour.

Mr. Wyeth: Flour—bread. That has all been passed upon.

Mr. Peffers: Yes, but that is not—

Mr. Wyeth: And tools are of a character that are more or less used and worn on the particular job to which they are sent, and are not considered permanent things for use in the future so much.

Mr. Hopkins: We have the authorities to show they are not competent; but, it will take time.

testimony of
James A.
Watrous.

383 Mr. Wyeth: Well, the Supreme and District courts have been passing upon it. Now, if there is any objection to those kind of things, I want to be able to explain it.

The Court: Better not take the time.

Mr. Peffers: It doesn't need any explanation. For example, if the court says scoops are part of—that they ought to pay for it, it speaks for itself; mixing handles, they used those in the work.

Mr. Wyeth: Other things that are destroyed.

The Court: Yes.

Mr. Peffers: I preserve the same objection.

The Court: You are after bigger game than that.

Mr. Peffers: That is right.

Mr. Wyeth: I don't want my bill destroyed by the general objection.

Redirect Examination by Mr. Wyeth.

Q Now, Mr. Watrous, you spoke of these orders made by the trustee or receiver in bankruptcy. You did not receipt for those orders in this invoice of yours?

A No, sir.

Q The goods which are covered by this invoice?

A No.

Q No. But two days later, orders which have been shown you, dated February 15, 1910, and after,—

384 A Those are the orders which were sent through by the receiver.

Q Yes.

A And are not contained in this invoice.

Q Orders by the receiver or trustee are not included in the amount you have testified to here?

A No, sir.

Mr. Wyeth: That is all.

Mr. Peffers: That is all.

Mr. Hopkins: Those are offered in evidence?

Mr. Wyeth: Yes. It is marked. It is admitted those were used on the job?

Mr. Peffers: Yes, on the job.

Mr. Wyeth: By the Schott Engineering Company.

385 Plaintiff's Exhibit 1, being invoice of Watrous, was and is in words and figures as follows, to-wit:

WATROUS EX 1

Watrous
Exhibit 1.

M. Watrous, Prop. J. A. Watrous, Manager.
(Cut) Established 1861
Waukegan, Ill. Oct. 1 1909

W. H. Schott

Naval Station a/c No. Chicago, Ill.

G. B. Watrous Sons

Dealers in

Hardware, Stoves, Cordage, Iron and Nails
Enameled and Nickel Ware, Glass, Carpenters, Machinist and
Millwright Tools

Fine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee St.

Sept. 1

10 Galls gasoline

\$ 1.50

Sein Twine

1.20

1/2 gall white paint

3.75

Tile scoops

2.50

\$ 8.95

Sept. 3

1 Gal engine oil

.60

2 Gall white paint

2.50

Sept. 4

10 pr 6 in stp hinges

2.00

8-8 in Hge hasps

1.00

10 Galls gasoline

1.50

5 Galls Lin oil

3.50

50# Red lead

5.00

8 Galls white paint

10.00

\$23.00

Sept. 8

1/2 Gall White paint

1.90

5 Galls Thread cut oil

3.75

6 Matlocks & Handles

6.00

\$11.65

Vatrous
Exhibit 1.

Sept. 9

9 2 in wrot couplings

1.80

Sept. 10

6 Hvy Galz pails

4.50

1 brass hyd Reducer 2 1/2 x 3/4

1.50

3 Galls white paint

6.00

Sept. 14

3.75

25 Galls kerosene

3.00

10 Galls Gasoline

1.50

2 Ham Handley

.20

2 wire Brushes

1.20

100 Plumber candles

4.50

\$10.40

Sept. 15

50 2 1/2 x 5/8 M. Bolts

1.75

Sept. 16

2 Brass Hose nipples

.50

25 Galls Kerosene

3.00

1 Grol. 1/2 x 16 Screws

.60

\$ 4.10

Sept. 18

24 3 x 5/16 Lag Scs.

.30

329# Tar felt

6.54

4 Zinc Oilers

.80

2 zinc Oilers

.30

10 Galls Gasoline

1.50

5 Galls Lin oil

3.50

\$12.64

Sept. 21

1—16 in Flat fils

.60

Sept. 22

1—16 in Flat files

.60

Sept. 24

32# 9 Ga Galz Wire

1.60

4 Sash Brushes

.80

1 Keg 8 nails

2.60

1 keg 16 nails

2.55

5 Gall Lin oil

3.50

7 N. M. Watrous, Prop. J. A. Watrous, Manager Watrous Exhibit 1
 (Cut) Established 1861
 Waukegan, Ill. Oct. 1, 1909

W. H. Schott
 Contd.

G. B. Watrous Sons
 Dealers in

Hardware, Stoves, Cordage, Iron and Nails
 Enameled and Nickel Ware, Glass, Carpenters, Machinist and
 Millwright Tools

Fine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee St.

Sept. 24

50# Red lead

5.00

5 Dog Battups

2.00

\$18.05

Sept. 28

2 Mach Hammers

2.30

Sept. 29

12-8 x 1/2 Lag scs.

.60

2-7 x 1/2 M. Bolts

.08

8-8 x 1/2 M. Bolts

.40

2-8 x 3/4 M. Bolts

.16

\$ 1.24

Sept. 30

1 Swivil

.10

\$110.39

Watrous
Exhibit 1.

388 N. M. Watrous, Prop.
(Cut)

J. A. Watrous, Mana
Established 1861
Waukegan, Ill. Nov. 1, 190

W. H. Schott

Naval Station a/c N. Chicago, Ill.

G. B. Watrous Sons

Dealers in

Hardware, Stoves, Cordage, Iron and Nails
Enameled and Nickel Ware, Glass, Carpenters, Machinist
Millwright Tools

Fine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee

Oct. 4 1 30 in handle	\$.20
100 Plumber Candles	4.00
25# Axle grease	1.25
20# 1/4 in. R. Iron	1.00
26 1/2# 1/2 in M. Rope	3.98

Oct. 5 5 Gal Lin. oil	3.50
10 Gal. Gasoline	1.50
12—12 in. H. S. Blades	1.20
1. 1 gal oil pot	.25

Oct. 7	
10# soap stone	
5 gal lin oil	3.50
10 Gal Black oil	2.50
1 Gal Gas Cyl. oil	.60

Oct. 9	
50 6 x 3/8 Lag ses.	
Oct. 11	
5 gal. Lin. Oil	
Oct. 12	
5 jts 6 in. sto. pipe	1.00
1 jt 7 x 6 sto pipe	.30
2 dampers put in	.40
50# Red lead	5.00
5 Gal Lin oil	3.50

Watrous Exhibit 1.

395

Watrous
Exhibit 1.

Oct. 16		
1/2 doz. 5 in files		.50
Oct. 19		
10 Gals Gasoline	1.50	
5 Galls Thred cut oil	3.75	
2 Hoy Brooms	1.00	
13# 5/8 R. Iron	.52	
23# Galz strap iron	1.15	
1 box Tind Rivets	.10	
1 9/16 Tapw Hnk Drill	1.00	
2 1 gall cans	.50	
1-10 Gal can	.90	
		<hr/>
		\$10.42
Oct. 20		
1 Wonder drill	2.00	
1 1/4 Pipe tap	.50	
2 7/16 Drills	.70	
12-1/4 in Nipple	.60	
		<hr/>
		\$ 3.80
Oct. 21		
1 gal cyl. oil	.60	
1-5 gall can	.50	
		<hr/>
		1.10
Oct. 22		
45-6 in Stps Hinges	4.50	
15 6 in Hqe Hasps	2.25	
1 14 in Flat file	.45	
20 Galls Kerosene	2.40	
4-5 gall cans	2.00	
		<hr/>
		\$11.60
Oct. 25		
20 Galls Gasoline		3.00
Oct 26		
3 30 in handles		.60

Watrous
Exhibit 1.389 N. M. Watrous, Prop.
(Cut)

J. A. Watrous, Manager

Established 1861

Waukegan, Ill. Nov. 1 1909

W. H. Schott
Contd.

No. 2

G. B. Watrous Sons

Dealers in

Hardware, Stoves, Cordage, Iron and Nails
Enameled and Nickel Ware, Glass, Carpenters, Machinist and
Millwright Tools

Fine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee St.

Oct. 27

10# soft soap

1.50

Oct 29

50# Red lead

5.00

5 gal Lin oil

3.50

\$8.50

Cr.

\$80.70

Oct. 21

1—10 Gall Can ret'd.

.90

\$79.80

N. M. Watrous, Prop. J. A. Watrous, Manager ^{Watrous}
 (Cut) Established 1861 Exhibit 1.
 Waukegan, Ill. Dec. 1, 1909

H. Schott
 Naval Station a/c No. Chicago, Ill.
 G. B. Watrous Sons
 Dealers in
 Hardware, Stoves, Cordage, Iron and Nails
 Painted and Nickel Ware, Glass, Carpenters, Machinist and
 Millwright Tools
 Fine Cutlery and Athletic Goods
 Telephone 71 114 N. Genesee St.

ov. 1		
or. 4 in hinges		\$.30
2 x 5/8 Ga Glasses	.75	
5/8 Gaskets	.25	
Plumber candles	3.90	
keg 16 nails	2.55	
Keg 6 nails	2.70	
4 # Tar felt	2.68	
Gall. Black oil	2.50	
5 gall cans	1.00	
		<hr/>
		\$16.33

ov. 1		
galls gasoline	1.50	
gal gas eng oil (cyl)	.60	
		<hr/>
		\$ 2.10

ov. 6		
2 1/2 in Bush	.15	
2 in Bush	.12	
2 Lant globes	1.20	
pr 6 in T. Hing	.25	
6 in Hg Hasp	.15	
W. W. brush	.50	
		<hr/>
		\$2.37

ov. 8		
paint Brush	.40	
22 Plumber candles	6.10	
		<hr/>
		\$ 6.50

Watrous
Exhibit 1.

Nov. 10		
1 1/2 in Tap Tap	.45	
2 7/16 Drill	.70	
2 8 in Tapr Fils	.40	
1 Alligator Wrench	.75	
		\$ 2.30
Nov. 11		
3 Balls wool twine		\$ 3.00
Nov. 12		
20 galls Kerosene	2.40	
1 Roofing brush	1.25	
		\$ 3.65
Nov. 15		
10 Gall Gasoline	1.50	
75 # Red lead	7.50	
5 Gall Thread Cut oil	3.75	
2 Brooms	.80	
1 Padlock	.35	
1 jt. sto. pipe	.20	
		\$14.10
Nov. 16		
9 Spools copper wire	.90	
1 1/2 # 1/4 in Washers	.23	
		\$ 1.13
Nov. 17		
1 Gall Gas Eng Oil	.60	
4 Lge Galv pails	2.40	
15 ft 1/8 pipe	.60	
		\$ 3.60
Nov. 18		
1 sheet 30 x 96 Galv Iron	1.50	
5 Gall Black Oil	1.25	

N. M. Watrous, Prop. J. A. Watrous, Manager Watrous Exhibit 1.
 (Cut) Established 1861
 Waukegan, Ill. 19.....

H. Schott
 Contd.

G. B. Watrous Sons
 Dealers in

Hardware, Stoves, Cordage, Iron and Nails
 Meled and Nickel Ware, Glass, Carpenters, Machinist and
 Millwright Tools

Cutlery and Athletic Goods
 Telephone 71

114 N. Genesee St.

gal gasoline
 ft Belt lace
 copper wire

1.50

.75

1.20

\$ 6.20

v. 19
 ry Battups

\$ 2.00

v. 20
 Plumber candles

\$ 2.10

v. 23
 -3/8 x 1/4 Couplings
 1/4 Couplings
 plumber candles

.30

.70

1.00

\$ 2.00

v. 26
 Gro 1x10 screws
 galls Kerosene
 Galls gasoline
 # Red Lead
 0 Plumber candles

1.50

2.40

1.50

2.50

9.00

\$16.90

v. 30,
 Roof brush
 Wall brushes

1.25

1.50

\$ 2.75

\$84.71

Cr.

v. 2
 5 gall cans ret'd.

\$2.50

\$82.21

*Bill of Exceptions.*Watrous
Exhibit 1.392 N. M. Watrous, Prop. J. A. Watrous, Manager
(Cut) Established 1861

Waukegan, Ill. Jan. 1, 1910

W. H. Schott

Naval Station a/c No. Chicago, Ill.

G. B. Watrous Sons

Dealers in

Hardware, Stoves, Cordage, Iron and Nails

Enameled and Nickel Ware, Glass, Carpenters, Machinist and

Millwright Tools

Fine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee St

Dec. 1.

10 galls black oil

\$2.50

14 9x1/2 Larg bolts

.70

\$ 3.20

Dec. 2

153 # Tar felt

3.83

100 2 1/2 x 5/8 M. Bolts

3.00

3 3 x 3/4 Set ses

.30

1 doz #2. wicks

.10

1 C. B. Lantern

1.00

10 Galls gasoline

1.50 \$ 9.70

Dec. 4

2 3/4 in Taps

\$ 1.30

Dec. 6

1 Carbindine stone

1.50

1 5/8 Drill

.75

\$ 2.20

Dec. 7

2 3/4 tee

.20

1 1 x 1/2 Bush

.07

2 3/4 x 1/2 Bush

.05

\$ 3.30

Watrous Exhibit 1.

401

Watrous
Exhibit 1.

Dec. 8		
1 Gall Thread cut oil	3.75	
10 Gall Gasoline	1.50	
Lant. (Small)	2.60	
Lant. Globes	.80	
		<hr/>
		\$ 8.65
Dec. 9		
2 1 1/4 Bush		\$.84
Dec. 10		
5 Galls Kerosene	3.00	
100 Plumber candles	10.00	
10 2 x 5/8 M. Bolts	1.50	
10 2 x 1/2 Bolts	1.25	
2 3/8 x 1/4 Coup.	.10	
		<hr/>
		\$15.85
Dec. 13		
50# Red lead	5.00	
5 Gall Turp	3.75	
4 H. Handles	.40	
18 in T. Wrench	1.00	
24 in Wall brushes	1.50	
		<hr/>
		\$11.65
Dec. 15		
40 Gall Kerosene	4.80	
10 Gall Gasoline	1.50	
7 # 1/2 in Washers	.70	
1 1/2# 1/4 Washers	.18	
1 Cabinet Rasp	.50	
2 Emery Cloth	.10	
		<hr/>
		\$ 7.78
Dec. 17		
10 Galls gasoline	1.50	
5 Galls Thread cut oil	3.75	
1 shut Drip Pan	.25	
		<hr/>
		\$ 5.50
Dec 20		
61 # 4 x 1/4 Iron	2.44	

Watrous
Exhibit 1.

393 N. M. Watrous, Prop. J. A. Watrous, Manager
(Cut) Established 1861
Waukegan, Ill. Jan. 1, 1910

W. H. Schott
Contd.

G. B. Watrous Sons
Dealers in

Hardware, Stoves, Cordage, Iron and Nails
Enameled and Nickel Ware, Glass, Carpenters, Machinist and
Millwright Tools

Fine Cutlery and Athletic Goods
Telephone 71

114 N. Genesee St.

Dec. 20,		
5 Dry Batteries	2.00	
1-6 in Trino Wrench	.90	
		\$ 5.34
Dec. 21		
1 6 in Stelson Wrench Jaw	.30	
3 doz 2 1/2 x 20 ses.	.30	
		\$.60
Dec. 22		
1 3/8 Drill	.30	
Dec. 23		
1/2 # Salamoniac	.13	
1 oil Faucet	.40	
		\$.53
Dec. 27		
10 Gall Gasoline	1.50	
20 Gall kerosene	2.40	
200 Plumber Candles	10.00	
6 Lant. Globes	.60	
		\$14.50

Watrous Exhibit 1.

403

Watrous
Exhibit 1.

a. 28
in. Bush
e. 30
Walz Pails
Glue
Wall Brush
Spg Balance
es Band Iron

.21

1.20
.20
1.00
.35
.15

\$ 2.90

\$91.45

Cr.

ce. 3
-5 Gall cans Retd

\$ 1.00

\$90.45

4 N. M. Watrous, Prop. J. A. Watrous, Manager
(Cut) Established 1861

Waukegan, Ill. Jan. 20, 1910

H. Schott

Naval Station a/c No. Chicago, Ill.

G. B. Watrous Sons

Dealers in

Hardware, Stoves, Cordage, Iron and Nails

enameled and Nickel Ware, Glass, Carpenters, Machinist and
Millwright Tools

ine Cutlery and Athletic Goods

Telephone 71

114 N. Genesee St.

an. 3
pr. Large Shears

\$ 2.50

an. 4
pointing trowels

\$.50

an. 5
6 in file
04 x 5/8 M. Bolts

.10
2.00

\$ 2.10

Watrous
Exhibit 1.

Jan. 6		
3-3 in Cast Elbows		\$1.00
Jan. 7		
6—3 in Nipples	1.20	
6 Lant Globes	.60	
		<hr/>
		\$ 1.80
Jan. 8		
20 Galls gasoline	3.00	
40 Galls Kerosene	4.80	
1 Gall Gas. Eng. oil	.75	
		<hr/>
		\$ 8.55
Jan. 11		
1 Gr. 1 1/2 x 12 Screws		\$.50
		<hr/>
		\$17.00

395 Counsel for defendant thereupon offered in evidence the orders from the Central Trust Company, as receiver and trustee of the Schott Engineering Company, to Watrous for supplies commencing with February 15, 1910, and there after, referred to by Mr. Wyeth, in words and figures as follows, to-wit:

Order, dated
Feb. 15, 1910.

396

February 15th, 1910.

G. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:—

Re: The Schott Engineering Company Receivership.

Please deliver to Mr. A. L. Closterhouse, the following material to apply on Job #116, viz:—

30 gal. of gasoline
12 lantern globes
24 hack saw blades
2 brooms
4 gals. coal oil
24-1/2" pipe straps
2 doz. tallow candles

and bill same to the Central Trust Company of Illinois, Receiver, The Schott Engineering Company.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS.

Receiver, The Schott Engineering Co.

Per

MOP-S

397

February 24th, 1910.

Order, dated
Feb. 24, 1910

G. B. Watrous & Sons,
Waukegan, Ill.

Gentlemen:—

Re: The Schott Engineering Company Receivership.

Please deliver to A. L. Closterhouse, North Chicago, Ill.,

c/r The Naval Training Station, the following:—

40 gal.—coal oil

6—1½ x 4" bushings

2—10" Mill Files

2—8"—three corner taper files,

10 gal. gasoline

2 gal. lard oil

Bill the same to the Central Trust Company of Illinois,

Trustee The Schott Engineering Company.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,

Trustee, The Schott Engineering Co.

Per

M.McD.—S

398

March 7th, 1910.

Order, dated
Mar. 7, 1910

G. B. Watrous & Sons,
Waukegan, Ill.

Gentlemen:—

Re: The Schott Engineering Co. Trusteeship.

Please deliver to A. L. Closterhouse, North Chicago, c/r The

U. S. Naval Training Station, the following:—

50—½ x 3" Lag bolts

2—Mason's Trowels

43—5/8 x 4½" Machine Bolts.

We understand the last two items were ordered by 'phone and have been delivered, in which case you will consider this order a confirmation, leaving the 50—½ x 3" Lag Bolts to deliver.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,

Trustee, The Schott Engineering Co.

Per

MOP/S

Order, dated
Mar. 21, 1910.

399

March 21st, 1910.

G. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:—

In re: The Schott Engineering Co. Trusteeship.

Please deliver to A. L. Closterhouse, North Chicago, Ill.
c/r The U. S. Naval Training Station: .

30 gals.—gasoline

50—5/16 x 3" lag bolts

3—1½ x 1" bushings

1—¾" Jenkins Globe valve

15—¾" Gate Valves

15—¾" C. I. Tees

1—Gal. water pail

1—dipper

sending invoice for the above to us.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Company
Per

MOP/S

Order, dated
Mar. 30, 1910.

400

March 30th, 1910.

G. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Please deliver to A. L. Closterhouse, North Chicago, Ill.
c/r The Naval Training Station,

2—padlocks

100—1" pipe straps

50#—wire nails

3—plugs for plumber's furnaces

1—gross—1¼" #12 wood screws

6—¼" pipe plugs

1¾#—Mason's lime.

invoicing the same to us.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-S

April 20th, 1910.

Order, dated
Apr. 20, 191J. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.
Please deliver to A. L. Closterhouse, North Chicago, Ill.
c/r The U. S. Naval Training Station, at once

20—2½" Cast iron twin Ells

1—waterproof brush

1 doz.—12" hack saw blades

15—½ x 1½" machine bolts

40 gals.—coal oil

2—3 x 2½" bushings

50—½ x 2" lag bolts

1—gross machine screws, all as selected,

biling the same to the Central Trust Company of Illinois,
Trustee The Schott Engineering Company.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.

Per

P-S

402

May 3rd, 1910.

Order, dated
May 3, 191G. B. Watrous Sons,
Waukegan, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.
Please deliver to A. L. Closterhouse, North Chicago, Ill.
c/r the U. S. Naval Training Station at once, the following
material as selected:

30 gal.—gasoline

20 " —coal oil

50 — —½ x 1½" machine bolts

50 — —½ x 5½" " "

3 — —Lanterns

3 — —Lantern Globes

1 — —1 gal, gasoline can,

16 — —3/16 x 1" Stove bolts -

18 — —½ x 1" Machine Bolts

24 — —5/16 x 1" " "

50 — —½ x 2" Lag Bolts

6 — —4" Staples

Order, dated
May 3, 1910.

1 gross 1 $\frac{1}{4}$ "—#10 wood screws
1 " Machine Screws
1 — —9/16" ratchot drill
2 " —6" Taper Files
2 — —Pointing Trowels
billing the same to the Central Trust Company of Illinois
Trustee, The Schott Engineering Company,

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, *The Schott Engineering Co.*
Per

P-S

Order, dated
June 3, 1910.

403

June 3rd, 1910.

G. B. Watrous & Sons,
Waukegan, Ill.

Gentlemen:—

In Re: The Schott Engineering Company, Trusteeship.
Confirming order for material which Mr. Closterhouse has
received, you will deliver the following material to him, in-
voicing the same to the Central Trust Company of Illinois
Trustee, The Schott Engineering Company:—

2—hammer handles
75— $\frac{1}{2}$ " x 2" bolts
2—paint brushes
20—gals. kerosene
30— " gasoline
2—pairs scissors
30— $\frac{1}{4}$ " x 2" lag bolts
1—doz. hack saw blades
12— $\frac{1}{4}$ " gauge cocks
1—1 $\frac{1}{2}$ " x 1 $\frac{1}{4}$ " reducing coupling

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, *The Schott Engineering Co.*
Per

P-S

May 20, 1913, 2:00 P. M.

JULIAN C. SMITH, a witness called on behalf of the claimant, Western Roofing & Supply Company, being first duly sworn, testified as follows:

Testimony of
Julian C.
Smith.

Direct Examination by Mr. Allen.

Q Will the witness please state his name and occupation?

A Julian C. Smith, president of the Smith-Potman Company.

Q Mr. Smith have you ever had any— do you know Mr. W. H. Schott?

A Yes.

Q Did you ever have any business relations with him?

A Yes.

Q What are they as far as the claim of the Western Roofing & Supply Company here is concerned?

Mr. Hopkins: Objected to in that form.

The Court: Overruled, let him answer.

405 Mr. Peffers: If the court please the orders are all in writing.

The Court: You may answer this question.

A When I was salesman for, or representative for the Western Roofing and Supply Company, Mr. W. H. Scott gave me an order for—

Mr. Peffers: Wait a minute I object if the order is in writing.

Mr. Allen: If the court please I think that it would take only a minute to—

The Court: I think I will admit that.

Mr. Allen: So far as this witness is concerned, we will connect that afterwards.

The Court: Connect it up afterwards. Proceed. He got an order.

A Mr. Schott gave me an order for pipe covering material to be used on the Naval Training Station at North Chicago to be applied on the hot water and steam lines on the work at the station. This order was given to me at a stated price to cover all materials, pipe covering materials to be used in connection with that work.

Mr. Allen:

Testimony of
Julian C.
Smith.

Q Was this contract given to you by Schott or the Schott Engineering Company?

A Mr. Schott gave me the contract personally, signed 406 his name to it.

Q What was the date of it, what was the date of the making of this contract?

A It was along in the early fall of 1908.

Mr. Allen: That is all.

Cross-Examination by Mr. Peffers.

Q Have you that contract now?

A Sir?

Q Where is that contract?

A I could not tell you, sir. I am no longer connected with the Western Roofing & Supply Company. I said I am president of the Smith-Potman Company, an entirely different concern.

Q Do you know where the order is?

A I am not now in touch with it, we are competitors at the present time.

Q What did the order cover?

A Covered pipe covering material for Mr. Schott's work.

Q What items, how many and what was it?

A I beg your pardon?

Q What was the pipe covering?

Mr. Allen: How much was it or how much did it cover in a general way?

A You mean lineal feet or dollars and cents?

Mr. Peffers: Q I mean lineal feet, each given size?

407 A I don't remember, I cannot tell that offhand from memory.

Mr. Hopkins: Q Was it in writing?

A I think it was in writing, signed by W. H. Schott.

Mr. Peffers: Q How many items were on the order?

A I could not tell you from memory.

Q When was the stuff shipped?

A Shipped along—I told you this was a blanket order. He was to draw on this as he required the material. The pipe has to be installed first before it is covered. For instance in the tunnels, has to be covered before the tunnels are opened and the pipes installed and tested.

Q How long were you with the Western Roofing & Supply Company?

A I cannot give you that exactly.

Q When did you go to work for them?

A I cannot give the exact date.

Q What year?

A I could not give you the year exactly from memory.

Q Was it in 1906, '07 or '05?

A I could not give you that without looking it up.

Q Was it in 1900?

A You mean in 1900?

Q Yes.

A I could not say as to that.

Q Haven't you any idea when you went to work for the Western Roofing & Supply Company?

A I was with them six or seven years I should say.

Q When did you quit them, what year?

A I quit them, I resigned a year ago the first day of last December.

Mr. Hopkins: What year was that?

Mr. Peffers: Q Then you resigned in December 1912, didn't you?

A I beg your pardon?

Q Then you resigned on December 1st 1911?

A That is right, that is right.

Q Then you were with them six years, so you commenced with them about 1904?

A Yes.

Q What year was this you had the conversation with Mr. Schott?

A I told a you it was the early fall of 1908.

Q Did you see to the shipping of the material after the fall of 1908?

A No, sir. I was not the shipping clerk, I was the salesman and closed the order with Mr. Schott

Q Did you have any orders from the Schott Engineering Company to do work up there?

A How is that?

Q Did you have any orders to ship material to the Schott Engineering Company?

A I don't know anything about that, all I know is I told you Mr. Schott gave me an order for this material, for the material that he would require on this work.

Testimony of
Julian C.
Smith.

409 Q Did you at any time while you were connected with the concern ever see an order from the Schott Engineering Company for pipe covering for the Naval Training Station?

A Yes, I have done business with the Schott Engineering Company on— well, in connection with Mr. Schott. I don't know whether he was representing the Schott Engineering Company or W. H. Schott or who it was. We shipped the material to W. H. Schott, whatever name it was, but of course that is a year or two years ago, the time I represented the Western Roofing on their work.

Q Now as a matter of fact you only shipped one shipment, didn't you to North Chicago to W. H. Schott?

A You better ask the manager of the company what they charged and shipped.

Mr. Hopkins: Never mind that. I ask the answer be stricken out.

Mr. Peffers: Never mind that.

A You say, you ask what was shipped?

Q Yes, the Western Roofing & Supply Company.

A How is that?

Q I mean the Western Roofing & Supply Company, that concern that you were with, only made one shipment to Schott?

A When?

Q In reference to the station at North Chicago?

410 A Oh, they made more than one trip.

Q How many orders did you get from Schott personally?

A Originally there was the order, blanket order covering the material, all of the material that he would require on that work.

Q Yes, now—

Mr. Allen: If your Honor please, we have a letter here, it is not proper for counsel here to—

Mr. Hopkins: That is what we want, to bring that out.

Mr. Peffers: Have you the original orders here of the Western Roofing & Supply Company?

Mr. Allen: We have not been able to locate the orders, Mr. Peffers.

Mr. Hopkins: Are these orders in evidence?

Mr. Allen: You have a copy here, I presume.

Mr. Hopkins: Let him produce what they have got.

r. Peffers: Q In this bill of particulars that was produced here under the shipment of February 18, 1909, do you know anything about that shipment? The first item under February 18, 1909?

Yes, those are the corresponding sizes and material on ground I should say.

That is the item that was referred to by Mr. Schott?

A When?

Q In the converse at you had with him. Does that refresh your recollection so that you can know that these are the items?

Part of these are the items.

Well, take the first item and after that we will take one of the others. I am talking about the first item there of February 18.

Part of it.

And with that disposed of—

Part of it.

Yes, part of it. Take the second item under July 15, 1909, do you see any similarity between that written order and these items? That is exactly the same thing, isn't it?

A Same quantity, something like that. The prices are not ended.

Q Yes. Did you ever see that order?

A No, sir.

Q Sir?

A No sir, not to my memory.

Q Do you know whether that was shipped out on this order, this item of 20 pounds of paste and 100 yards of canvas, whether it was shipped on that order or not?

A It is a pretty hard question for me to answer Mr.—you have probably seen 10,000 orders since that time in a number of years, it is pretty hard to recall one item of 20 pounds of paste, flower paste and a few yards of canvas.

Q Well, what was your position with the Western Roofing & Supply Company?

A I was representing them in the sale of any such material.

Q Did all their orders come through you?

A No.

Q In this vicinity?

A No.

Q Did they have any other office other than this here?

Testimony of
Julian C.
Smith.

A There was the main office of the Western Roofing & Supply Company where I worked.

Q You saw all orders then came—

A I saw every order that came in connection with the Naval Training Station.

Q You saw every order?

A Yes.

Q Then you want to tell the court and jury that every order that came to your establishment is brought to you, you want the jury to understand that?

A Well, I will tell you, you ask me whether I received at the time the order was closed, I don't remember ever having had that slip or that size piece of paper. Now understand me I am going to rely on my memory. As I told you I probably have seen 10,000 orders in the past four or five years,
413 probably see 25 or 50 a day right now as a competitor of the Western Roofing & Supply Company. I think you are asking a good deal to ask me to identify two items in a piece of paper like that.

Q Well, are you prepared to say that you can give us any information or throw any light on these orders that came from the Schott Engineering Company. You have told the court and jury that every item that went to the Naval Station at North Chicago was shipped out on this blanket order?

A They filled that blanket order at stated prices, Mr. Schott closed the order to protect himself on the prices.

Mr. Peffers: If the court please I insist on having the witness answer the question.

Mr. Allen: He has got the right to state it is a blanket order.

The Court: Put the question.

Mr. Peffers: Q Are you prepared to say the Western Roofing & Supply Company did not receive a specific order for every item that went into that work?

A Just read that question please?

Q Are you prepared to say that the Western Roofing & Supply Company did not receive a specific order for every shipment that went to the Naval Station at North Chicago?

414 A So far as I know they received an order for every bit of material that went on the ground.

Q Then did they receive, according to your understanding, any other or different order than this blanket order that you mentioned?

A Oh, yes.

Q Well, don't you recognize any of these orders?

A You showed me one. What orders do you refer to?

Q Do you recognize this order number 4164 of June 9th, 1909, signed by the Schott Engineering Company?

A I don't understand. Are these copies may I ask? Is that a fair question?

Q Oh yes, they are copies.

The Court: They are copies.

Mr. Peffers: Q Would the carbon copies, the original carbon copies assist you any?

A That would be more of an assistance I think yes.

Mr. Allen: If your Honor please this witness has stated to the jury that he was a salesman, he hasn't personal knowledge of these orders. Now counsel it seems to me is attempting to confuse that simply to compel this witness to say if he got a copy of the orders, as he says he has, why doesn't he come ahead and put them in.

415 The Court: This witness representing the corporation says there was one order, one blanket order given for all that material.

Mr. Allen: I think that was the form, as to the blanket order, and there were a lot of other orders for specific material under this one blanket order.

Mr. Hopkins: What we want to get at is there was apparently no blanket order, no order at all other than all of these orders from the Schott Engineering Company, and this witness knows it.

Mr. Peffers: Q Did you ever see order number 4165? Take the book here.

A You want me to examine this list attached?

Q Yes, examine that list that is attached there.

A It would look to me as though these orders were applied on that blanket order.

Q Is there anything there that you see in and about that blanket order, that you see there, if so read it to the court.

A I notice there is on this order "Please ship to W. H. Schott, North Chicago, Illinois."

Q Read the rest of the order.

A Care U. S. Naval Training Station via Chicago Northwestern Railway. This was instructions to the Western
416 Roofing and Supply Company to ship this material to W. H. Schott, North Chicago, Illinois, Care U. S. Naval Training Station.

Q How is it signed?

Testimony of
Julian C.
Smith.

A Signed by Schott Engineering Company and the name Payne.

Mr. Allen: That order itself is the best evidence Mr. Smith, just hold on a minute.

Mr. Peffers: Wait until I finish my cross examination.

Q The only thing that indicates to you it had reference to any blanket order is the fact it says "please ship to W. H. Schott," is that your idea of it?

A How is that?

Q The only thing that indicates to your mind that it was under any blanket order was the fact that it says "Please ship to W. H. Schott"?

A Yes, that leads me to believe that order referred, applied to the blanket order.

Q That don't say anything about any blanket order, does it, that you see?

A No, sir.

Q As a matter of fact the Western Roofing & Supply Company filled that order, didn't it?

A How is that?

Q The Western Roofing & Supply Company filled that order?

417 A Naturally supposed they did.

Q And they shipped the stuff to W. H. Schott, didn't they, and charged it to the Schott Engineering Company?

A I don't know who they charged it to.

Q Do you know whether they received later on at various times as many as twenty orders on the same form?

A I could not say. We probably received them, received these orders. He would have the benefit of drawing if he required any material that he wanted.

Mr. Hopkins: Wait a minute I object to that as attempting to interpret a written contract.

The Court: No, he has stated what the original arrangement was.

Mr. Hopkins: That was the one that was—

The Witness: Will the court permit me to state just a minute?

The Court: You want to state something?

The Witness: Yes, sir. This gentleman here, Mr. Hopkins I believe, made the insinuation here a moment ago that I knew—

The Court: Oh well, never mind that, never mind.

The Witness: I want you to understand, as well as the

ry and the other gentlemen, I am here a totally disinterested party. I have no object in holding back anything?

18 The Court: Oh well go on.

The Witness: I am here to tell the truth and the whole

truth.

Mr. Hopkins: If it annoyed you, I will withdraw the remark.

The Witness: No, I just don't want you to misunderstand my position.

Mr. Peffers: Q Did you give the Western Roofing & Supply Company any directions as to how this stuff should be charged?

A No, sir.

Q Did you go back with your blanket order to your company?

A Yes, sir.

Q Did you have anything to do with the preparation of the letter of May 24th, addressed to the Schott Engineering Company concerning their account?

A No, sir, that was dictated by the Treasurer of the Western Roofing & Supply Company, the assistant treasurer.

Q And who was this blanket order made by, that you mentioned, was it by Schott personally, W. H. Schott?

A Yes.

Q That was made in what year?

A 1908 as I remember it.

Q Yes. And then after January 1st, 1909, you got all the orders coming from the Schott Engineering Company, didn't they?

A I could not say as to that, sir.

Q Can you say as to how any of them came after that date?

A Under what name?

Q Schott Engineering Company.

A All I know is that as I just told you a moment ago if this gentlemen will permit me to say it—

Q Go ahead.

The Court: Go ahead.

Mr. Hopkins: I was not interfering with you in reference to this—

A I received the order from Mr. Schott, as I told you, for that material and he had the privilege of drawing orders, drawing on that order as fast as he wanted it.

Mr. Peffers: Q I see. Wasn't that only—let us under-

Testimony of
Julian C.
Smith.

stand each other, maybe I misunderstood you, wasn't that only a salesman's general order—

A It is usual.

Q To get in on the job?

A That is right.

Q And all that you did, you simply went to Schott and said "Schott, I want your order for the Naval Training job."

A It did not come quite that easy.

420 Q I know, you worked hard on the job, I understand, you went there and talked with Schott and maybe talked a day or maybe talked a week but you made an arrangement with Schott to furnish the stuff on that order, isn't that the idea?

A I worked on that for two or three years.

Q Yes.

A Before ground was broken on the present site.

Q Yes, but what I am getting at is, to come down to the particular contract, you went and told Schott, you simply made a deal with Schott?

A I wanted a written order for that material so the other fellow would not beat me to it, that was all.

Q And then later on they came in with these orders?

Mr. Hopkins: Q Now was there any order different than an order like that, that is the ones that were received after the first of January, 1909?

Mr. Peffers: After January 1st, 1909, was there any orders or do you know anything about that?

A The order was—

Q This one that I showed to you.

Mr. Hopkins: Was that the form that you got them?

Mr. Peffers: Q Different that the one I showed you, the one you looked at.

421 A As far as that is concerned I might not have seen all those orders received afterwards, I might have been out.

Q You were not interested as to how they were received, they had the order, as to how the orders came in?

A The shipping of it, I have nothing whatever to do with that.

Q I guess we understand each other all right.

A I am a salesman rather than a shipping—

Mr. Peffers: All right.

Re-direct Examination by Mr. Allen.

Testimony of
Julian C.
Smith.

Q Now Mr. Smith, the inference that Mr. Peffers wants this jury to draw here of the relationship that you had with this man Schott—

Mr. Hopkins: I object to that statement.

Mr. Peffers: Are you going to make some speech now?

The Court: Ask your question.

Mr. Allen: Q Was the written arrangement made that Mr. Schott entered into, was it understood between you and Mr. Schott that he would buy all the material of that kind that he was going to use on that job of you?

A Yes.

422 Mr. Peffers: I object.

Mr. Allen: Q So that was the understanding was it?

A Yes.

The Court: It appears.

Mr. Allen: And later on he simply was to give you instructions as to when this company should ship that stuff, is that right, or were there further instructions?

A No, that was it.

Mr. Allen: All right.

Re-cross Examination by Mr. Peffers.

Q Wasn't each shipment made on each order that way?

A As he required the material.

Q Yes, with each order?

A We were furnished with the order just as he required the material.

Q And you would not ship until you got that order?

A An order would call for the stuff they wished, a thousand feet of covering—

Mr. Hopkins: Q There would be an order for that?

A An order for that.

Q In other words you would not ship without a specific order?

423 The Court: Well, that is perfectly plain.

Testimony of
Julian C.
Smith.

Re-re-direct Examination by Mr. Allen.

Q I understand all these later orders were put in under the contract and they were on particular instructions—

Mr. Peffers: I object to that. Wait a minute.

Mr. Allen: That is just the point now, that is a fair question.

Mr. Peffers: No, it is not.

The Court: The difficulty is the first order would not be valid or binding because that did not describe any amount, just a blanket order.

Mr. Peffers: It was a salesman's deal, that was all.

Mr. Allen: It was a blanket order for what they would use for that job.

The Court: Just simply to land the job.

Mr. Allen: That is it.

The Witness: Just a moment. There was the size and quantity set out in the blanket order.

The Court: Q But not the quantity?

A Yes, sir.

Q Did he agree to take that quantity or wasn't it that he wanted that quantity, wasn't it he would require—

424 A He could have taken more if he wished it.

Q But was it an order for a given quantity no more and no less?

A It gave the quantity and sizes, there were two different kinds, two different constructions, one for hot water and one for steam.

Q Was it to be as much as he needed or required for the pipe?

A How is that?

Q Was it to be as much covering as he needed for the pipe?

A Yes, he figured it according to the class, what he wanted according to the measurements.

Mr. Allen: Q Did he approximate those amounts, Mr. Smith?

A Why he had all the items as I recollect, all the sizes 8 inch, 6 inch, 12 inch, so many feet each.

Mr. Peffers: In other words simply a way of figuring the job.

Mr. Allen: Yes and I think that that contract is a binding contract.

The Court: Well, that is a question of law. I think we know the facts now. Testimony of
Julian C
Smith.

Mr. Allen: All right, that is all.

The Court: Mr. Smith has given us the facts. All right.

425

May 20, 1913.
2 P. M.

ALBERT B. COLE called as a witness on behalf of the claimant, Western Roofing & Supply Company, being first sworn, was examined in chief by Mr. Allen, and testified as follows: Testimony of
Albert B.
Cole.

Q State your name and business?

A Albert B. Cole; manager and treasurer of the Western Roofing & Supply Company.

Q Mr. Cole, did you ever see a written order of Mr. W. H. Schott, for certain materials, from your company?

A Yes sir, I did.

Q Do you know where that order is?

A No sir, I do not.

Q Do you know what date that order bore?

A No, sir.

Q Do you know what year?

A My recollection is that it was in the month of October, 1908.

Q 1908. Have you searched through all of your records to find it?

A Yes, sir.

Q You have received orders from the Schott—W. H. Schott, or the engineering company, which was the fact in most of the cases, did you not, written orders?

A Yes, sir.

426 Q Have you located—have you looked for those orders?

A Yes, sir.

Q Have you been able to find them?

A Not all of them.

Q Well, what orders have you been able to find?

A My recollection is there was some orders relating to small shipments made from Chicago which we located.

Q When you received these later orders for the smaller

Testimony of
Albert B.
Cole.

amounts, or the amounts from time to time as they wanted them, how did you go about filling those orders?

A Those orders were filled in the usual manner, the order was made up in the department and sent to the shipping department, and the goods were shipped.

Q Where were the goods shipped from?

A Small orders were shipped from the Chicago warehouse at 24th and La Salle streets.

Q The others were shipped—

A The others were shipped from our factory at Lochland, Ohio, near Cincinnati.

Q When those goods were shipped from Lochland—how are they put into a car?

Mr. Peffers: That is wholly immaterial, if the court please.

Mr. Allen: That is leading up to something that is material, your Honor.

The Court: Overruled.

Mr. Peffers: All right.

A The goods are trucked or carried into the car, and 427 they are checked at the door as they are loaded into the car.

Mr. Peffers: Is the exact amount of the materials that is put into those cars written down by anyone in your employ?

A Yes, sir.

Q Will you please look over these papers and see if you are familiar with them, and then state what they are?

A The first paper is the—what we call the check list of the man who stands at the door of the car and checks the goods.

Mr. Peffers: Just a minute. If your Honor please, he is narrating a custom and practice. He dont say that he knows who it is, then, or supervised this thing or anything else.

The Court: Overruled.

Mr. Allen: He is stating what the practice is; and in the morning I will bring the man here, in accordance with the understanding I had with Mr. Peffers, and he will identify the writing on those shipping lists.

The Court: Overruled. Better stand away from the jury.

A The first document is the check list of the man who counted the goods as they were placed in the car.

Mr. Peffers: I object to that unless he shows that he was there and knows something about it, if your Honor please.

428 The Court: He is stating the custom; I think it is proper. The business, the custom—if it is a custom that was always observed—

A Yes sir, the usual custom of loading goods into a car.

The Court: The system they had in order to check up just what went out.

A Yes sir, still in existence there.

Mr. Allen: Q Mr. Cole, please state what the second paper is?

A The second paper is the billing instructions, which is an office record of the Western Roofing & Supply Company for these goods loaded into this car, and constitutes the document from which we make our bill against the stores or concerns to whom the goods are shipped.

Q Yes.

A This is one of three documents that are made up in our office. This is made up in triplicate, a record of the order, shipping instructions and billing instructions. This is the billing instruction from which we bill to the customer. I might state that this order is made up in my own writing, I wrote this order myself. The next document is the bill of lading, showing shipment of the goods from Lochland, Ohio, to North Chicago.

Q Who is that bill of lading to—who is the consignee on the bill of lading?

Mr Peffers: It speaks for itself.

The Court: Give it to us if it is there.

429 Mr Allen: Yes.

A This bill of lading is to E. J. McDonough, care of Naval Training Station, North Chicago.

Q How do you account for the fact this bill of lading is made out to E. J. McDonough?

Mr Hopkins: I object to it.

Mr Allen: If your Honor please—

The Court: Overruled.

Mr. Hopkins: Exception.

The Court: Can you tell?

A At the time, we were shipping goods to E. J. McDonough at North Chicago and also to W. H. Schott. I didnt notice it in that shipment. But it is possible that the bill of lading may have been made up to E. J. McDonough instead of W. H. Schott.

Mr Allen: Q Which one of the shipments is this, as regards the other shipments made?

A That I could not say, because I dont know the date of it. I am fairly familiar with the dates of the shipments.

Q The shipment will show that this is the first one. Have

Testimony of
Albert E.
Cole.

you any way of knowing, Mr. Cole, from your dealings with you had afterwards with W. H. Schott, that W. H. Schott received this material?

A Yes, sir.

Q What is it?

430 A I talked with Mr. W. H. Schott regarding that material.

Q Have you any other way of knowing that this material was received? Is this the first shipment?

A I received letters from W. H. Schott regarding shipments of that material.

Q Was all of this shipment of material in compliance with government specifications?

A Yes, sir.

Mr Hopkins: I object, that is a conclusion.

The Court: One moment.

Mr Hopkins: I ask to have that answer stricken out.

The Court: Strike it out.

Mr Allen: All right.

Q Was any of this material returned?

A There was a small amount of material returned, and billed on the total shipment.

Q It was returned by Schott, was it not?

A Returned by Schott.

Mr Hopkins: I object to that. That question is improper.

Mr Allen: Did you have any correspondence—

The Court: It might be returned by Schott, and still be returned by Engineering Company.

Mr Hopkins: That is true, but there would be some writing or something of that kind to show. His evidence is not the best evidence on that point.

Mr Allen: The only purpose why I am asking it, if you

Honor please, is to show the first shipment, the bill of lading which was made to E. J. McDonough, in fact Schott or his company, or whatever it was there, did get the material.

The Court: Because they returned it.

Mr Allen: Because they returned part of it, and were given credit for \$2300.00 worth, on this very bill of particulars, on that shipment.

The Court: See what he knows about this.

Mr Allen: Q What do you know about the return of this stuff?

A I know that a certain part of that shipment was refused

by the government as not being up to specifications and was returned, for which we gave credit.

Mr Hopkins: Is that all with this witness?

Mr Allen: Oh no, we have got a lot more.

Mr Hopkins: Just note this, I want to examine on this point, that is all.

Mr Allen: I wish to introduce this as our exhibit. Do we begin at the first, or follow the others, your Honor?

The Court: What?

Mr Allen: Do we begin, with our exhibits, as number 1, or do we follow the others?

The Court: Call it Cole Number 1.

Mr Hopkins: Western Roofing Number 1.

Mr Allen: Western Roofing Exhibit Number 1.

432 Mr. Hopkins: Our regular objection goes to this.

The Court: It goes in subject to objection.

Which said exhibit consisted of a checking list, a "Billing Instructions", a bill of lading, an invoice and a credit memorandum, all of which papers are in words and figures following, to-wit:

CHECKING LIST.

[illegible]

433 Original (1) Billing Instructions.
The Western Roofing & Supply Co.,
Chicago, Ill.

Western Roof-
ing Exhibit
No. 1.

Date Rec'd 12/31 '08

No. 8724

Customer's Order No. 3833 Req. No. Shipped from
Bill to W. H. Schott
City Chicago County State Ill.
Street Address 1100-1126 American Trust Bldg.

Ship to Above c/ Naval Training Sta. When
Street Address City No. Chicago
Route C. & N. W. County State Ill.

References
Draw through Terms:

Source Mail Credit sale to Smith
(Collect,
Freight, (Prepaid, \$ Prices F. O. B.

Items					Extensions
93 Ft. 12"	spec.	Hot Water Corg.	1" @	1.85	172.05
177 "	7 "	" "	" "	1.00	177.00
426	5 "	" "	" "	.70	298.20
1863	4 "	" "	" "	.60	1117.80
123	3 1/2 "	" "	" "	.50	61.50
2904	3 "	" "	" "	.45	1306.08
2823	2 1/2 "	" "	" "	.40	1129.20
246	2 "	" "	" "	.36	88.54
					4351.11
					979.00

Billed
Feb. 22 1909
Western Roofing & Supply Co.
Chicago.

Part of order 3476 Factory Shipt.
See #7970
Date Shipped Net Amt. Invoice
2/16-09 970.00

(1) This is (only) not the Original Bill of Lading, nor a copy or duplicate covering Shipper's No. the property named hereon; It is intended solely for filing or record, as a Memorandum Acknowledgment that a bill of lading Agent's No. has been issued.

Received subject to the classification in effect on the date of the receipt by the Carrier of the property described in this Original Bill of Lading, at Lockland, Ohio, 2/15 1909
from The Philip Carey Company.

If..... If 1st If 2d If 3d If 4th If 5th If 6th If Special
times 1st Class Class Class Class Class Class per
20¢

..... Agent
Per.....
(The signature of the Agent
here acknowledges only the
rate given.)

Mail Address—Not for purposes of Delivery.
Consigned to E. J. McDonough c/o Naval Training Sta. Gt. Lakes
Destination, No. Chicago State of Ills. County of
Route, C. H. & D. Monon-C. & N. W. Car Initial C. H. & D.
Car No. 45,760

No. packages	Description of articles and special marks	Weight (subject to correction)	Class or rate	Check column.
	Rolls of roofing paper	)	If Shipper wishe to	
	Bbls. Roof Coating	)	prepay the charges, write	
	Half bbls. roof coating	)	or stamp here. "To be	
	Pails roof coating	)	prepaid."	
	Boxes roof material	)	Prepaid \$..... to apply	
	Roof brushes	)	in prepayment of the	
	Bbls. Pitch	)	charges on the property	

Kegs nails	)	described hereon	
Crates Asbestos pipe covering	)	24,000 .	
Car Covering	)	<i>Agent or Cashier</i>	
Cases " " "	)	Per	
Bundles " " "	)	(The signature here ac-	
Bbls. " " "	)	knowledges only the	
Boxes " " "	)	amount prepaid.)	
)		
Bags Asbestos Cement	)	Charges Advanced:	
Bags mineral wool)	\$	

This shipment is tendered and received subject to the terms and conditions of the Company's Uniform Bill of Lading, effective November 1st, 1908.

This receipt is not negotiable, and if the shipment consigned to order, it must be exchanged for the company's Uniform Order Bill of Lading.

O. McFARLAND,
Shipper's Signature

W. A. SNODGRASS,
Agent's Signature.
(The signature of Agent here acknowledges only the receipt of the property.)

Western Roof-
ing Exhibit
No. 1.

435

INVOICE.

Private Exchange Harrison 5902. All accounts payable in Chi-
cago or New York funds.

Western Roofing & Supply Company
616 Fisher Building.

Chicago, Ill., Feb. 16th 1909.

Order No. Our No.

Reg. No. 3833 Charge No. 8724

Car No. Via C&NW

F. O. B. Shipped to

Sold to W. H. Schott,

1100-1126 American Trust Bldg.,

Chicago, Ill.

Subject to sight draft in 30 days without further notice.

Interest charged on Past Due Accounts.

93 ft. 12"	Special Hot Water Covg. 1" thk.	@ 1.85	172.05
177 ft. 7"	" " " "	@ 1.00	177.00
426 ft. 5"	" " " "	@ .70	298.20
1863 ft. 4"	" " " "	@ .60	1117.80
123 ft. 3½"	" " " "	@ .50	61.50
2904 ft. 3"	" " " "	@ .45	1306.80
2823 ft. 2½"	" " " "	@ .40	1129.20
246 ft. 2"	" " " "	@ .36	88.54

Less 75—10%

979.00

Shipped %

Naval Trainnig Station,
North Chicago, Ill.

Notice. All contracts are subject to strikes, fires and other contingencies beyond our control.

All claims must be made immediately upon receipt of goods.

Our responsibility ceases after delivery to transportation company; for any losses or breakage your recourse is upon them.

CREDIT MEMORANDUM.

Western Roof-
ing Exhibit
No. 1.

Western Roofing & Supply Company,
616 Fisher Building.
Chicago, Ill., May 13th 1909.

edit to

W. H. Schott Engineering Co.,
Bldg.

1100 American Trust Copy
Chicago, Ill.

Copy Copy Copy

Famous
for its durability.
Carey's Magnesia
Flexible
Roofing Cement

We have this day credited your accounts as follows:

8724-1910.

15 ft.	12"	Spec. Hot Water Covg.	@ 1.85	27.75
9 ft.	7"	"	@ 1.00	9.00
9 ft.	4"	"	@ .60	545.40
42 ft.	3 1/2"	"	@ .50	21.00
905 ft.	3"	"	@ .45	452.25
281 ft.	2 1/2"	"	@ .40	512.40
93 ft.	2"	"	@ .36	33.48
48 ft.	5"	"	@ .70	33.60

1634.88

Less 75—10%

367.85

37 Mr. Allen: I want to ask Mr. Cole to whom is this invoice made?

Mr. Hopkins: The invoice speaks for itself.

The Court: Doesnt it speak for itself?

Mr. Allen: It does speak for itself, your Honor. And for that reason the objection wont apply, because there is nothing shown with the Engineering Company at all, no relation at all.

The Court: Well, refer to the paper and state who to?

Mr Hopkins: It is shifted after 1909.

Mr. Peffers: May 13, 1909, W. H. Schott Engineering Company, 1100 American Trust Building, Chicago.

Mr Allen: Beg pardon. I was referring to the billing instructions here which we call the invoice.

Testimony of
Albert B.
Cole.

Mr Hopkins: That is the credit they gave on it, to the Schott Engineering Company.

Mr. Allen: Yes, sir.

The Court: That is sufficient to identify it.

Mr Allen: Yes.

Q Please examine these papers, Mr. Cole.

A The first document is a receipted freight bill, duplicate, for two boxes of material shipped to W. H. Schott, North Chicago, by the Western Roofing & Supply Company. The second document is the billing instructions for that material, consisting of 20 pounds of paste, a hundred yards of seven ounce canvas. The third document is a copy of the invoice. The fourth document is a credit instruction which corresponds to the billing instruction, as an office record for material returned. The last item is a credit memorandum, which corresponds to the invoice to the customer giving him credit for the material returned.

Mr Allen: Your Honor, while they are looking at that, I wish to say we have about seventeen of these, following in the exact order in which they come on the bill of particulars; I have gone over them with Mr. Peffers, and I suggested this, merely to save time, he might check them all and let me introduce them without having the witness name each one of these papers.

Mr Peffers: I object to that, if the court please, to that arrangement, unless they put in the orders upon which they are shipped.

Now, if the court please, I want to expedite things just as much as anybody, but there is the last one that was identified by the witness, it is an invoice that the witness has identified as being sold to the Schott Engineering Company; the order number is 4218. I want to call the court's attention to the items I read from it, and tried to get the former witness to identify it, twenty pounds of paste at five cents, and a hundred yards of canvas, etc. They shipped it on order

439 4218, and they charged it to Schott Engineering Company.

Here is the order; and I tried to get him to identify it, and he wouldnt do it.

The Court: Have you seen all these papers before?

Mr Hopkins: Not all of them.

Mr Allen: I have shown them all to him. He doesnt remember those papers by my holding them here, but I have shown them all to Mr. Peffers.

Mr Peffers: Let me see them.

Mr Allen: Your Honor, we do not deny that these later orders, as they call them, came in on the Engineering Company's papers. We haven't got the orders, and we will be very willing if they will produce copies, they will probably show they were on the Engineering Company's paper.

Mr Peffers: I do not know when we were called upon to produce them. They are records which came from the Trustee's office, they are lying in front of you.

Mr Allen: I never had the privilege of seeing those records before today, if your Honor please.

The Court: These papers seem to show on their own face that they are charged up to the Engineering Company.

Mr Peffers: Exactly. Here is the one in evidence, dated July 27, 1909, shipped to the Naval Station, sold to the Schott Engineering Company, a hundred yards of canvas. They left off the order number there. I have compared the order on the bill of particulars, and I can point out the particular order that applies on.

Mr Allen: We cannot, if your Honor please. Let him produce them.

The Court: I do not see any way of hurrying this.

Mr. Peffers: If the court please—

The Court: I do not see any way of hurrying this, I

Mr Peffers: It is conceded—if it is conceded they are shipped out on the orders that are shown here, it will simplify. And that is what I understood. I never had any other information from the gentlemen on the other side that there was any other purported arrangement.

Mr Allen: If your Honor please, I want to make my remarks short. In the first place, I stated to Mr. Peffers that we did not have these orders, that they probably have this first one, for the specific amounts were on letterheads bearing the name of the Schott Engineering Company. We would not dispute that point. We have got no evidence whatever, and we cannot do anything more than we have done, and produce what we have here.

Mr Peffers: I want to say to the court—and I want to wipe out as much detail as I can—there is my pencil memorandums on the bill of particulars, and it has got noted opposite it the order that compares with the item on the bill of particulars, and I have checked every item.

The Court: The number of the order?

Mr Peffers: The number of the order, and the details.

Testimony of
Albert B.
Cole.

The Court: From these books?

Mr Allen: From these books, compared—

Mr Peffers: For example, 405 feet of 8 inch hot water covering. That was shown on their order.

The Court: Those are all Engineering Company orders?

Mr Peffers: Yes, they were, I think, and they so show on their invoices.

Mr. Allen: If your Honor please, Mr. Peffers has had these books. I have not seen the books. I do not know anything about them; and if Mr. Peffers wants anything shown from those books, he can put them in and show it, we have no objection.

The Court: Would it be possible for you to look at those books yourself?

Mr. Allen: It will take quite a little time. I will be glad to do it though.

Mr. Peffers: Your Honor, there is the bill of particulars and he don't have to go to any work except to look at the order numbers I have noted in pencil.

442 The Court: On the order?

Mr. Peffers: The orders are right there lying on the table.

The Court: And are in consecutive number?

Mr. Peffers: Yes sir. There is 4218.

The Court: The jury may be excused until nine thirty tomorrow morning. Nine thirty.

You will have to look those over. Perhaps you can do that now, Mr. Allen.

Mr. Allen: Well, I will.

The Court: And by morning you will be able to shorten this.

Mr. Allen: Yes.

Whereupon an adjournment was taken until the next day Wednesday, May 21, 1913, at 9:30 o'clock A. M.

Wednesday, May 21, A. D. 1913.
9:30 O'clock A. M.

Testimony of
Albert B.
Cole.

Court met pursuant to adjournment.

The hearing on the claim of the Western Roofing & Supply Company was resumed as follows:

ALBERT B. COLE resumed the stand for further direct examination by Mr. Allen, and testified as follows:

Mr. Allen: If your Honor please, in compliance with the suggestion made by counsel for the Surety Company yesterday, we want to admit that all of these goods which were shipped, were shipped according to directions in some fifty orders, all of which are on orders bearing the printed name of Schott Engineering Company, all except one, that is the first order for the first shipment which we put in yesterday. I do not think it will be necessary for me to take each one of these books and show them to the witness.

The Court: That will save quite a lot of time.

Mr. Peffers: I suggest, if the court please, that he offer in evidence the orders of which I furnished counsel carbon copies.

Mr. Allen: I will offer as many of the copies here as counsel desires, and these books.

Mr. Peffers: I have all of the orders here, and I suggest counsel can have them marked as his exhibits, offering the correct copies or the orders which were mentioned on the invoices. You can offer that as your exhibit to save time.

The Court: These orders may be offered by numbers.

Mr. Peffers: Yes. Well, I have all of the orders here, if the court please.

The Court: You have them taken out?

Mr. Peffers: Yes, they are correct copies.

Mr. Allen: Your Honor, I think they are correct. I have not examined them very carefully. If we could, I would like to have these books in in evidence. Are the carbon copies—

Mr. Peffers: I dont care. Our stenographers have compared them. If you want to compare them, you may compare them, to save time.

The Court: I suggest that you take a little time later and find out if those are the correct ones.

Mr. Peffers: Yes. You can offer them, and if he wants

Testimony of
Albert B.
Cole.

to correct anything, he may. I am satisfied they are correct because they were compared in our office, if your Honor please.

Mr. Allen: I want to read into the record a part 445 order 3833. The order is addressed to Messrs. Weste

Roofing & Supply Company, dated August 4, 190
"Please ship to W. H. Schott, North Chicago, Illinois
United States Naval Training Station, pipe covering as p
government specifications for my contract at North Chic
Station, price as per standard list of even date, less seven
five and ten per cent on water covering, and seventy per ce
on steam covering. Quantity App as per attached schedu
W. H. Schott, by W. H. Schott."

Mr. Peffers: Let's see.

Mr. Hopkins: Is that the first order?

The Court: What is the date of it?

Mr. Allen: August 4, 1908.

Mr. Peffers: That is the first order, if the court please.

The Court: The first order.

Mr. Peffers: That is only one item, the first item; t
amount of the bill, as I understand it, counsel, is \$979.00, l
deduction of \$367.00.

Mr. Allen: That is right.

Mr. Peffers: On that particular order. The other orde
if your Honor please, are Schott Engineering Company
ders, every one of them.

Mr. Allen: Q Mr. Cole, have you examined—are th
carbon copies taken from the carbon copies in the order book

A Yes, sir.

446 Q To whom are these orders directed to be sent?

A To whom are the goods to be shipped?

Q Yes.

A The shipping instructions—

Mr. Hopkins: Wait a minute. The orders speak for the
selves.

Mr. Allen: Your Honor, I want to call the attention
the jury to the fact that those orders which have been in
duced here, with two exceptions, I believe, from the time t
the Schott Engineering Company succeeded W. H. Sch
the goods are directed to be sent to the Schott Engineer
Company is scratched off—to W. H. Schott, North Chicag

Mr. Peffers: You offer that as your exhibit number wh

Mr. Allen: The number following the other.

Mr. Peffers: All right.

Testimony of
Albert B.
Cole.

Mr. Allen: Subject to any changes I may want to make later.

Mr. Peffers: Any corrections?

Mr. Allen: I think it is number 2; I am not sure.

(Which said exhibit last above referred to so offered and received in evidence as aforesaid, marked Western Roofing & Supply Company Exhibit Number 2, and is as follows, to-wit):

47 The Schott Engineering Company
 315 Dearborn Street
 Chicago

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

Chicago, June 9th 1909 Requisition No. 4164

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, No. Chicago, Ill.

Care U. S. Naval Station

Via C. & N. W. Ry.

The list of covering hereto attached and as per Gov. requirements with which your Mr. Smith is familiar.

Invoice in triplicate—Original and duplicate with prices—triplicate without prices.

Note:

For any information regarding detail of this order refer to our Mr. Greist.

Mr. Greist.

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By PAYNE.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
Light—Heat—Power—Gas—Water Works
Chicago
Designing
Consulting
Constructing

Date.....

Signed By.....

Refer to.....

Job No.

Sketch No.

Scale.....

Pipe covering for Entire Receiving Group
Naval Training Station.

448 2750 feet for 8" Water pipe

500 " " 7" " "

500 " " 6" " "

370 " " 5" " "

1900 " " 4" " "

40 " " 3½" " "

250 " " 3" " "

400 " " 2" " "

315 " " 1½" " "

1375 " " 3" Steam Pipe

250 " " 2½" " "

510 " " 2" " "

880 " " 1½" " "

760 " " 1¼" " "

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, June 9th 1909

Requisition No. 416

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, No. Chicago
Ill.

Care U. S. Naval Station

Via C. & N. W. Ry.

708 ft. of 9" X Hvy covering for steam main

As per Gov. specifications and with which your Mr. Smith
is familiar. See Art. 175 hereto attached.

Invoice in triplicate

Original and duplicate with prices

Triplicate without prices.

449 Note: For any information regarding detail on this
order, refer to our Mr. Greist.

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By PAYNE.

Pipe Covering.

175. Steam Mains in Tunnel.

Steam mains and branches in tunnel shall be covered with a sectional covering, made up of alternate layers of asbestos and wool felt to standard thickness and with $\frac{1}{4}$ inch of water-proofed felt over this, all to be finished with canvas jacket, banded and painted substantially, as specified for hot-water mains.

Valves, flanges, fittings and other equipment shall be covered with moulded covering of equal insulating quality, 1 inch thick, finished as above. Drips where required shall be covered same as mains. Vapor branches connecting drip receivers to building mains shall be covered. Branches from vacuum valves to vacuum return will not be covered.

176. Steam Mains Outside of Tunnel.

Steam mains and branches outside of tunnel shall be laid in a wooden pipe covering, similar to that specified for hot water mains, but shall be lined with tin and asbestos and shall be equal to Wyckoff lined casing.

177.

Mains and branches in valve boxes, manholes, basements, and below bridges to be covered as specified for mains in tunnel.

178.

Connections of covering to tunnel and building walls to be as specified for hot water mains.

179. Gauge Connections.

Install ten nipple and cock connections for pressure gauges on steam main at points to be designated by the officer in charge.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago June 29th 1909

Requisition No. 4199

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.

Care Naval Station

Via C. & N. W. Ry.

100 Sax Asbestos plastic cement

(Approved by Gov. instead of moulded. June 28, 09)

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requisi-
tion.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE

The Schott Engineering Company
315 Dearborn Street
Chicago

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

Chicago, July 13 1909

Requisition No. 4218

Messrs. Western Roofing & Supply Co.

Address

Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.

Care Naval Station

Via C. & N. W. Ry.

51 20# Paste

100 yds. 7 oz. canvas for covering fittings.

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, August 19th 1909
Messrs. Western Roofing Co.

Requisition No. 4299

Address Chicago

Please ship to ~~The~~ Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.

Care U. S. Naval Station

Via C. & N. W.

$\frac{1}{2}$ bbl. Magnesia Lap Cement

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requis-
ition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By W. L. FOSTER

The Schott Engineering Company
315 Dearborn Street
Chicago

Western Roof-
ing & Suppl
Co. Exhibit
No. 2.

Chicago, Sept. 3rd 1909 Requisition No.4336
Messrs. Western Roofing & Supply Co.

Address Chicago

452 Please ship to The Schott Eng. Co. W. H. Schott, North
Chicago, Ill.

Care U. S. Naval Training Station

Via C. & N. W.

Services

Covering for Main Tunnel	35 ft. 1½"	Water
178 ft. ¾"	45 "	2" "
259 " 1" "	2510 "	2½" "
245 " 1¼" "	3598 "	3" "
711 " 1½" "	180 "	3½" "
121 " 4" "	410 "	4" "
340 " 5" "	50 "	4½" "
	100 "	5" "
	1020 "	6" "
	500 "	2½" "

Note!

As per Govt Specifications.

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By W. L. FOSTER.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, Sept. 4th 1909

Requisition No. 4340

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, No. Chicago,
Ill.

Care U. S. Naval Station

Via C. & N. W. and express, see below.

453 200 ft. 1" Steam Covering

Ship above by express.

300 ft. 1½" steam covering by freight.

For drains from traps.

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY.

By W. L. FOSTER

The Schott Engineering Company
315 Dearborn Street
Chicago

Western Roof
ing & Supply
Co. Exhibit
No. 2.

Chicago, Sept. 4th, 1909 Requisition No. 4350
Messrs. Western Roofing & Supply Co.
Address 24th & LaSalle, Chicago.
Please ship to The Schott Eng. Co. North Chicago
Care U. S. Naval Sta.
Via C. & N. W. Ry.

Covering for Main Tunnels

	705 ft.	9"	Steam
	640 "	7"	"
	1982 "	6"	"
	335 "	5"	"
	140 "	4"	"
	595 "	1½"	"
	20 "	1½"	"
	1602 "	1"	"
	520 "	¾"	"
	832 ft.	12"	Water
	4593 "	10"	"
	515 "	9"	"
	1902 "	6"	"
	1240 "	5"	"
	75 "	4½"	"
	40 "	4"	"
	34 "	3½"	"
454	684 "	3"	"
	325 "	2½"	"
	115 "	1½"	"

This pipe covering to conform to U. S. Govt. specifications,
same as previous orders.

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By W. L. FOSTER.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, Sept. 30th 1909

Requisition No. 4446

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.

Care U. S. Naval Station

Via C. & N. W.

250 ft. 1½" Steam Covering as per Govt. Specifications.

Confirming Phone order.

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By W. L. FOSTER

455

The Schott Engineering Company
315 Dearborn Street
Chicago

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

Chicago, Oct. 1st 1909

Requisition No. 4452

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, No. Chicago,
Ill.

Care U. S. Naval Station.

Via C. & N. W.

100 ft. 8" Water Covering

50 " 3" Steam "

As per Govt. Specifications

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requis-
ition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,

By W. L. FOSTER.

Bill of Exceptions.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, Oct. 16th 1909

Requisition No. 4537

Messrs. Western Roofing & Supply Co.

Address Chicago.

Please ship to The Schott Eng. Co. North Chicago, Ill.

Care U. S. Naval Station

Via C. & N. W. Ry.

150 yds. 7 oz. Canvas for pipe covering

Note!

Deliver no invoices to employes. Mail same to 315 Dearborn Street, with Bill of Lading.

456 Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By W. L. FOSTER

The Schott Engineering Company
315 Dearborn Street
Chicago

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

Chicago, Nov. 8th 1909

Requisition No. 4600

Messrs. Western Roofing & Supply Co.

Address Chicago

Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.

Care Naval Station

Via C. & N. W. Ry.

1 Drum Pipe Covering Paste

Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requis-
ition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE.

Western Roof-
ing & Supply
Co. Exhibit
No. 2.

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, Dec. 9th 1909 Requisition No. 4703
Messrs. Western Roofing & Supply Co.
Address Chicago
Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.
Care Naval Station
Via C. & N. W. Ry.
2 bbl Pipe Covering Paste.

457 Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requis-
ition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE

The Schott Engineering Company
315 Dearborn Street
Chicago

Chicago, Dec. 24th 1909 Requisition No. 4732
Messrs. Western Roofing & Supply Co.
Address Chicago
Please ship to The Schott Eng. Co. W. H. Schott, North Chi-
cago, Ill.
Care Naval Station
Via C. & N. W. Ry.
100 yards 7 oz. canvas for pipe covering.
Note!

Deliver no invoices to employes. Mail same to 315 Dear-
born Street, with Bill of Lading.

Will not be responsible for goods delivered without requis-
ition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY,
By PAYNE

458 Mr Allen: Now, your Honor, we get back again to this bill of lading, the billing instructions, invoices, credit for freight and so forth on these specific shipments which we have in the bill of particulars. Now, I am willing to put those in any way Mr. Peffers suggests.

Mr Peffers: I say I have no objection to your putting them in just as they are now. We preserve our legal objections heretofore urged, if your Honor please, these here are directed to the Schott Engineering Company.

The Court: They are what?

Mr Peffers: I say they are all directed to the Schott Engineering Company.

The Court: Directed to the Schott Engineering Company?

Mr Peffers: All of the bills.

The Court: They are?

Mr Peffers: All these orders are orders of the Schott Engineering Company. They are objected to, we preserve our objections.

The Court: They may be admitted subject to your objection, and they may be marked as Cole exhibits—are you marking them Cole exhibits?

Mr Allen: I had better not take the time now, but later in the day I will straighten these out and show them to Mr. Peffers, and make them satisfactory to him, and we will introduce them all as Cole exhibits.

459 Which said documents last above referred to were later so offered and received in evidence and marked Western Roofing & Supply Company Exhibits 1H-16H inclusive, and consisted of "Billing Instructions," invoices, credit memoranda, and bills of lading.

The invoices are in the words and figures as follows:

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

Western Roofing & Supply Company,
N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., Feb. 18, 1909.

Order No. 3833 Our No. 8724

Via C. & N. W.

Sold to W. H. Schott,
1100-1126 American Trust Bldg.,
Chicago, Ills.

Terms, Net Cash, Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

93	Ft.	12"	Special	Hot	Water	Covg.	1"	Thick	1.85	172.05
177	"	7"	"	"	"	"	"	"	1.00	177.00
426	"	5"	"	"	"	"	"	"	.70	298.20
1863	"	4"	"	"	"	"	"	"	.60	1117.80
123	"	3½"	"	"	"	"	"	"	.50	61.50
2904	"	3"	"	"	"	"	"	"	.45	1306.80
2823	"	2½"	"	"	"	"	"	"	.40	1129.20
246	"	2"	"	"	"	"	"	"	.36	88.54

Less 75-10%

3874.00

Shipped c/o
Naval Training Station,
North Chicago, Ills.

460

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Western Roofing & Supply Co. Exhibits 1H-16H.

4164—

Chicago, Ill., July 20-09

Order No. 4165 Our No. 11941

Via from Lockland

Ship to W. H. Schott % U S Naval Station, North Chicago, Ill.

Sold to The Schott Engineering Company, Chicago, Illinois

Terms, Net Cash. Subject to sight draft in 30 days without further notice. Interest charged on Past Due Accounts.

405 ft	8"	Hot Water Pipe Covg	1.10	445.50
399 ft	7"	"	1.00	399.00
255 ft	5"	"	.70	178.50
570 ft	4"	"	.60	342.00
171 ft	2"	"	.36	61.56
87 ft	1½"	"	.33	28.71
less 75-10%			1455.27	327.44
1050 "	3"	Steam Pipe covg 1/32 th	.45	472.50
252 "	2½"	"	.40	100.80
384 "	2"	"	.36	138.24
882 "	1½"	"	.33	291.06
417 "	1½"	"	.30	125.10
531 "	9"	"	1.20	637.20
less 70%			1764.90	529.47
				856.91

Western Roofing & Supply Company

N E Cor. 24th & La Salle Sts.

Our No. 11900 Chicago, Ill., July 27-1909

Ship to U S Naval Station North Chicago, Illinois.

Sold to The Schott Engineering Company, Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without further notice. Interest charged on Past Due Accounts.

100 yards 7 oz canvas 12-1/2 12.50

454

Bill of Exceptions.

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

461

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., July 15, 1909

Order No. 4218 Our No. 11589

Via C N. W

Ship to W. H. Schott Naval Station. North Chicago,
Ill.,Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

20# paste	at .05	1.00	
100 yds 7 oz canvas			
for covering fittings .10 yd		10.00	11.00

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., July 20-1909

Order No. 4199 Our No. 11291

Via from Lockland

Ship to W. H. Schott % Naval Station, North Chicago,
Ill.

Sold to

The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

12500#

100 bags Asbestos Cement #1 125# each at 1.25 cwt. 156.25

462

Western Roofing & Supply Company,

N E Cor. 24th & La Salle Sts.,

Chicago, Ill., July 24-1909.

Western Roofing & Supply Co. Exhibit 1H-16H.

Our No. 4164 Our No. 10842

Via from Lockland

Ship to W H Schott % U S Naval Station, North
Chicago, Illinois.

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charge on Past Due Accounts.

2346 ft	8"	Water Pipe covering	1.10	2580.60
102 ft	7"	"	1.00	102.00
117 ft.	5"	"	.70	81.90
1332 ft	4"	"	.60	799.20
42 ft	3-1/2"	"	.50	21.00
207 ft	3"	"	.45	93.15
231 ft	2"	"	.36	83.16
228 ft	1-1/2"	"	.33	75.24
less 75-10%			3836.25	863.16

Western Roofing & Supply Company,

N E Cor. 24th & La Salle Sts.,

Chicago, Ill., July 24-1909

Order No. 4165 Our No. 10844

Via from Lockland

Ship to W H Schott % U S Naval Station, North
Chicago, Illinois

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

77 ft 9"	Steam Pipe Covering at 1.20	212.40
Less 70%		63.72

456

Bill of Exceptions.

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

463

Western Roofing and Supply Company,
N E Cor. 24th & La Salle Sts.,

Chicago, Ills., July 24-09.

Order No. 4164 Our No. 10843

Via from Lockland

Ship to W H Schott % U S Naval Station, North
Chicago, Illinois.

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days with-
out further notice. Interest charged on Past Due Accounts.

327 ft	3" Steam Pipe Covg	.45	147.15
126 ft	2" "	.36	45.36
345 ft	1-1/4" "	.30	103.50

 296.01

less 70%

88.80

Western Roofing & Supply Company,
N E Cor. 24th & La Salle Sts.,

Our No. 12114

Chicago, Ill., August 17-09

Via from Lockland

Ship to U S Naval Station, North Chicago, Illinois,

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

501 ft	6" Hot Water Pipe Covering	.80	400.80
less 70-10%			108.22

464

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., August 20-09

Order No. 4299 Our No. 12466

Via C N W

Ship to W H Schott % U S Naval Station, North
Chgo. Ill.

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

1/2 barrel Asphalt paint 25 gallons .50 gal 12.50

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., August 12-09

Our No. 12810

Ship to North Chicago, Illinois.

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

21 yards 7 oz canvas

.12

14.52

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

458

Bill of Exceptions.

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

465

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., Sept. 10-09

Order No. 4340 Our No. 12906

Via from Lock

Ship to same % U S Naval Station, North Chicago, Ill
Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

201 feet 1" Special Steam Pipe covg	.27	54.27
for government work		
less 70%		17.28

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 10-22-09.

Order No. 4537 Our No. 14248

Via C N W

Ship to U S Naval Station North Chicago, Illinois.
Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

150 yards 7 oz canvas	.15	22.50
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66

Western Roofing & Supply Company,

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-12-09

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

Order No. 4340 Our No. 12947

Via Monon CNW Exp.

Ship to W. H. Schott, c/o U. S. Naval Sta.,
N. Chicago, Ill.

Sold to Schott Engineering Co.,
Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

00 Ft. 1½" Spec. Steam Covg.	.33	99.00	
Less 70%			29.70

Western Roofing & Supply Company,

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-10-'09

Order No. 4600 Our No. 14914

Via C. & N. W.

Ship to Schott, c/o Naval Sta., North Chicago, Ill.

Sold to The Schott Engineering Co.,
315 Dearborn St.,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

Barrel Pipe Covering Paste	195#	@	.07	13.65
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460

Bill of Exceptions.

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

467

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-10-'09

Our No. 13615

Via from facty. Ags 9889

Ship to same, c/o Naval Training Sta., North Chgo, Ill.

Sold to The Schott Engineering Co.,
Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

195 Ft. 1 1/4" Spl. Covg. for steam	@ .30	58.50	
Less 70%			17.55
Back ordered 55 ft. 1 1/4" Covg.			

Western Roofing & Supply Company,
N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-15-'09

Order No. 4452 Our No. 13652

Via C. N. W. from fety. Monon

Ship to Same c/o Naval Training Sta., North Chgo
Ill.

Sold to The Schott Engineering Co.,
315 Dearborn St.,
Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

90 Ft. 8" Spec. Water Covg.	@ 1.10	99.00	
Less 75 & 10%			22.88
51 Ft. 3" Spec Steam Covg.	" .45	22.95	
Less 70%			6.88

As per Government Specifications

29.76

468

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-10-'09

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

Our No. 15182

Via Ags 9889

Ship to U. S. Naval Sta., North Chicago, Illinois.

Sold to Schott Engineering Company,
Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

180 Ft. 1 1/2" Spec.	Steam	Pipe	Covg.	.3	54.00
711 " 1 1/2" "	"	"	"	.33	234.63
123 " 4" "	"	"	"	.60	73.80
342 " 5" "	"	"	"	.70	239.40

Less 70%

601.83

180.55

36 Ft. 1 1/2" Spec.	Hot	Water	Covg.	.33	11.88
45 " 2" "	"	"	"	.36	16.20
2667 " 2 1/2" "	"	"	"	.40	1066.80
3357 " 3" "	"	"	"	.45	1510.65
180 " 3 1/2" "	"	"	"	.50	90.00
411 " 4" "	"	"	"	.60	246.60
51 " 4 1/2" "	"	"	"	.65	33.15
102 " 5" "	"	"	"	.70	71.40
975 " 6" "	"	"	"	.80	780.00

Less 75-10%

3826.68

861.00

1041.55

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill. 11-17-'09

Our No. 15195

Via Monon C. N. W.

Ship to U. S. Naval Sta., North Chicago, Ill.

Sold to Schott Engineering Co.,

315 Dearborn St., Chicago, Ill.

Terms, Net Cash. Subject to Sight Draft in 30 days without
further notice. Interest charged on Past Due Accounts.

12 Ft. 8" Spec. Hot Water Covg.

@ 1.10 13.20

Less 75 & 10%

2.97

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

469

Western Roofing & Supply Company,
N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-15-'09

Order No. 4350 Our No. 15171

Via From Facy.

Ship to Same, c/o J. S. Naval Sta., North Chgo
Ill.

Sold to The Schott Engineering Co.,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days with-
further notice. Interest charged on Past Due Accounts.

165 Ft. 6 "	Spec. Steam Pipe Cov. @	.80	132.00
42 " 5 "	" " " " "	.70	29.40
141 " 4 "	" " " " "	.60	84.60
453 " 1 1/2 "	" " " " "	.33	149.49
21 " 1 1/4 "	" " " " "	.30	6.30
			401.79
Less 70%			120.54

174 Ft. 12 "	Spec. Hot Water Covg. @	1.85	321.90
84 " 10 "	" " " " "	1.30	109.20
288 " 9 "	" " " " "	1.20	345.60
783 " 5 "	" " " " "	.70	548.10
75 " 4 1/2 "	" " " " "	.65	48.75
42 " 4 "	" " " " "	.60	25.20
			1398.75
Less 75-10%			314.72

435.26

Western Roofing & Supply Company,
N. E. Cor. 24th La Salle Sts.

Chicago, Ill., 12-13-'09

Order No. 4703 Our No. 15802

Via C. & N. W.

Ship to W. H. Schott, N. Chicago,
c/o Naval Station.

Sold to The Schott Engineering Co.,
315 Dearborn St., Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days with-
further notice. Interest charged on Past Due Accounts.

2 Barrels Pipe Covering Paste 534# @ .07 Lb.

37

470

Western Roofing & Supply Company,
N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-17-'09

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

Our No. 15234

Via Ny Nh & H # 76226

Ship To same, c/o U. S. Naval Sta., North Chicago, Ill.

Sold To

Shott Engineering Co.,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

564 Ft. 6" Spec. Steam Pipe Covg. @	.80	451.20	
Less 70%			135.36
522 Ft. 12" Spec. Hot Water Covg. "	1.85	965.70	
606 " 10" " " " "	1.30	787.80	
87 " 9" " " " "	1.20	104.40	
777 " 6" " " " "	.80	621.60	
459 " 5" " " " "	.70	321.30	
		2800.80	
Less 75-10%			630.18

765.54

Western Roofing & Supply Company,
N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-19-09

Our No. 15549

Via C. & N. W.

Ship To same U. S. Naval Sta., North Chicago, Ill.

Sold To The Schott Engineering Co.,
Chicago, Ill.

Terms, Net Cash. Subject to sight draft in 30 days without
further notice. Interest charged on Past Due Accounts.

180 Ft. 3" Spec. Steam Covg.	.24	43.20	
261 " 1" " " " "	.27	70.47	
123 " 1 1/4" " " " "	.30	36.90	
		150.57	
Less 70%			45.17
243 Ft. 3" Spec. Hot Water Covg.	.45	109.35	
45 " 6" " " " "	.80	36.00	
345 " 2 1/2" " " " "	.40	138.00	
		283.35	
Less 75-10%			63.76

108.93

Western Roof-
ing & Supply
Co. Exhibits
1H-16H.

471

Western Roofing & Supply Company

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., 11-19-09.

Our No. 15548

Via G. T. 4280

Ship to same c/o U. S. Naval Sta., North Chicago, Ill.

Sold to The Schott Engineering Company,
Chicago, Illinois.

Terms, Net Cash. Subject to sight draft in 30 days with
further notice. Interest charged on Past Due Accounts.

63 Ft. 7" Spec. Steam Covg.	1.00	63.00
338 " 6" " " "	.80	271.20
51 " 5" " " "	.70	35.70
105 " 1" " " "	.27	28.35

398.25

Less 70%

119.47

138 Ft. 12" Spec. Hot Water Covg.	1.85	255.30
858 " 10" " " "	1.30	1115.40
105 " 9" " " "	1.20	126.00
312 " 6" " " "	.80	249.60
225 " 3" " " "	.45	101.25
120 " 2½" " " "	.40	48.00

Less 75-10%

426.50

Western Roofing & Supply Company,

N. E. Cor. 24th & La Salle Sts.,

Chicago, Ill., Dec. 28, 1909

Order No. 4732

Charge No. 16172

Ship to North Chicago.

Sold to The Schott Engineering Co.

Chicago, Ills.

Terms, Net Cash. Subject to sight draft in 30 days with
further notice. Interest charged on Past Due Accounts.

100 yds. 7 oz. Canvas

14½¢

14.50

472 Some of the Billing Instructions contained these words: "Bill to Schott Engineering Company. Ship to W. H. Schott." Others contained the words: "Bill to Schott Engineering Company. Ship to same."

Three of the Bills of Lading contained the words: "Consigned to W. H. Schott, North Chicago." Two contained the words: "Consigned to W. H. Schott Engineering Company, North Chicago." One contained the words: "Consigned to Schott Engineering Company, North Chicago."

The credit memoranda all contained the words: "Credit to Schott Engineering Company, Chicago, Illinois."

The other words and figures on these documents related only to the dates which the documents bore, the amount and kinds of materials furnished and the prices therefor and to the amount of credit given for freight.

473 Mr Peffers: I have no desire to have you offer that peculiar check mark you have got there. That is entirely unnecessary, as to the loading into the car. It would unnecessarily incumber the record, and there is nothing on its face indicating what it is.

Mr Allen: I will not bring that out.

Mr Peffers: We are not objecting to it. We will admit the stuff was used by the Schott Engineering Company.

Mr Allen: All right.

Mr Peffers: Shown on your bills as used by the Schott Engineering Company.

Mr Allen: You will admit this stuff went to Chicago, under the facts which are brought out here, and it was used on the job.

Mr Peffers: By the Schott Engineering Company.

The Court: That is the same admission that was made yesterday in regard to the other claimant.

Mr Peffers: It was all shipped after the 1st of January, 1909, and all of it, except 1, is on order of the Schott Engineering Company. I admit it was used on the job by the Schott Engineering Company.

Mr Allen: You will probably admit one order was used by W. H. Schott, wont you?

Mr Peffers: No, I wouldnt. It was not shipped until February 18, 1909, and I have got the bill here where

474 you charged it to the Schott Engineering Company, as I showed by your witness.

testimony of
Albert B.
Cole.

Mr Allen: That shows that was sent to W. H. Schott. It is not necessary for them to admit that.

Mr Peffers: My admission is limited to the fact that it was used by the Schott Engineering Company.

Mr Allen: All right.

Q Mr. Cole, have you been to North Chicago since this job was completed?

A Yes, sir.

Q Is the material which you furnished in such a condition that you could now, or that you were able to identify it?

Mr Peffers: Oh, that is objected to.

Mr Hopkins: That is unnecessary.

Mr Peffers: You dont have to show that it was up there.

The Court: There is no question about its being there.

Mr Peffers: Oh, I just admitted it, your Honor, I admitted everything that was mentioned in the bill was sent up there, and was used by the Schott Engineering Company in the job at the Naval Training Station.

The Court: That is sufficient for your purposes, that it was there.

Mr Allen: It was there. That is all right. I do not like this "Schott Engineering Company" too much.

Mr Hopkins: All right.

The Court: Their admission does not bind you. You 475 can contend it was really Schott, after all.

Mr Allen: Q Mr. Cole, did you see this original order, which was obtained by your original representative, Mr. Smith?

A Yes, sir.

Q How soon did you see it after it was made?

A During that day or the following day.

Q Who has charge in your office of the matter of getting up shipments on such a contract?

Mr Peffers: Well, I think that is all immaterial, your Honor, after what has been shown here; I do not see what difference it makes.

Mr Allen: I think we can make it show a little difference in a minute, your Honor.

The Court: Overruled.

A Will you kindly repeat the question again? I dont understand it.

(Question read).

A The question is a little indefinite. The shipping of the

goods, and the handling of the orders in the office—I dont quite understand.

Mr Allen: Q There is some one in your office, as a matter of fact, isnt there, Mr. Cole, who has to see to the sending of these orders which they—

A Making out of the orders?

Q Yes, and giving instructions to the factory.

476 A That is done by an assistant in the department.

Q Who was the assistant?

A At the time these orders were made out I was the assistant manager in the department.

Q Do you remember whether any original contract contained anything relative to the time and manner of the filing of the contract?

A My recollection is that the original order stated that shipments of goods were to be made on orders to be sent in at some future time.

Q Did you understand by that order, Mr. Cole, that you had a right to go ahead then and fill it?

Mr Peffers: I object to that.

Mr Hopkins: Well, I object to that. Wait a minute.

The Court: Yes, that is objectionable.

Mr Allen: The prices charged for these goods, Mr. Cole,—are they the same prices as you ordinarily get?

A No, sir.

Mr Peffers: I object to that.

Mr Hopkins: It dont make any difference whether they are or are not.

Mr Allen: If the court please, I think the—

The Court: Let the answer stand.

Mr Hopkins: Why, he asked him if they charged more or less for these goods than they did their other customers. That is not it.

The Court: I dont think it makes any difference.

Mr Allen: Q How was this particular price determined and made what it was?

Mr Peffers: That is immaterial, if the court please.

Mr Allen: If your Honor please, I submit it is immaterial.

The Court: I dont think it can be material; I dont see how it can possibly be material.

Mr Allen: I want to show your Honor that the prices could not have been made what they were unless they would have gotten a contract for a large amount, which he did get a contract for.

testimony of
Albert B.
Cole.

The Court. That doesn't make a bit of difference, see. The question is whether Schott really was operating there after this corporation was formed. That is, whether another form of Schott's interest was there.

Mr Allen: I think that is a question in the case, your Honor. I think another one is the duty of a man with whom you have a contract to notify you of the change of his business relation. That is, if a partnership succeeded a corporation, or an individual is succeeded by a corporation. Of course that is not material in this question.

The Court: You had all these orders.

Mr Allen: What?

The Court: You had all these orders. You started right on giving these orders, in the early part of January.

Mr Allen: Q Mr. Cole, do you remember of ever having 478 ing any information given you by W. H. Schott, or the Illinois Surety Company, that he was succeeded by a corporation?

Mr Peffers: That is objected to.

Mr Hopkins: - Wait, that is objected to. The orders speak for themselves.

The Court: You may show that. You can show it from the orders.

Mr Allen: Yes. A man may do business in a company's name, your Honor.

The Court: You may answer.

A I have no recollection of any such information being given.

Mr Allen: Q Did you ever investigate or in any way find out or know anything about this corporation, aside from what you saw on the letter heads?

Mr Peffers: That is objected to. Wait a minute, that is objected to.

The Court: Overruled.

Mr Peffers: Exception.

The Court: You mean the bill head or letter heads?

Mr Allen: These orders.

A My impression is that when those orders were received we paid no attention to whether the orders were received from Schott Engineering Company, W. H. Schott, or W. H. Schott Company,—being under the impression—

479 Mr Hopkins: Never mind about your impression.

The Court: No, never mind about your impression.

A Well—

The Court: That does not quite answer the question please. Read the question.

Mr Allen: Read the question again please?
(Question read).

A No.

Q After the 1st of January, 1909—or did you ever receive any letters on the letter head of W. H. Schott?

A I think we did.

Q Or did you ever receive any letters signed by W. H. Schott?

A I think we did.

Q Mr. Cole, did your company ever furnish any goods to the receiver, which took over the business of the Schott Engineering Company?

A Not that I remember.

Q Do you remember of having any conversation with the receiver or its attorneys as to your petition with them?

A Yes, sir.

Q As far as furnishing more goods was concerned?

A Yes, sir.

Q What was that?

Mr Hopkins: I object to that. It is not competent.

The Court: Please read it.

(Question read).

Mr Hopkins: A conversation after the receiver was appointed had nothing to do with it.

The Court: You are trying to show something along that line, and I think that I will let him explain. Overruled.

Mr Allen: Q What do you mean—

A My recollection is we were asked—

Mr Hopkins: Now, "asked"—if he is going to swear to that, we want something definite. If he is talking—

The Court: By whom?

Mr Hopkins: The individual he was talking with.

A I couldnt give you the name of the individual. It has been five years ago or five years ago.

Mr Hopkins: Well, then, your Honor can see the—

The Court: Very well.

Mr Allen: Just a minute, Mr. Hopkins please, we will bring that out.

Q Mr. Cole, look at that letter and see if you can refresh your memory as to where that conversation took place?

A My recollection is that the conversation took place in the office of the Central Trust Company.

Testimony of
Albert B.
Cole.

Q Now, state, Mr. Cole, what took place at that conversation?

Mr Hopkins: Well, I object to that, unless he states to the parties, so that we can—

Mr Allen: If your Honor please, he went over the—

Mr Hopkins: —find out about it.

481 Mr Allen: He went over to the Central Trust Company, that has a lot of offices, it would be impossible to tell what man that was.

Mr Hopkins: The Central Trust Company had one individual that represented them in this matter. The Central Trust Company has sixty or seventy different people connected with it, but we are not interested in those; we want to know which one of the sixty or seventy people it was that he talked with.

Mr Allen: If your Honor please—

The Court: Take it for what it is worth, he may answer. It may not amount to anything.

Mr Hopkins: What is that?

The Court: It may not amount to anything.

Mr Allen: If your Honor please, I want to state further, as a matter of fact, some half dozen people over there have quite a little authority in the bankruptcy department; you go there one time and you get one, and another day you may see another.

The Court: He may state what was said.

A We had received a letter from the Central Trust Company asking us to furnish materials, under certain conditions in connection with the Naval Training Station.

Mr Hopkins: Have you got that letter?

A I don't know whether we have or not.

Mr Allen: I have got it.

482 A And we simply—I called on them and stated our position, which is outlined in this letter.

Q State briefly, Mr. Cole, what you told them about furnishing goods?

Mr Hopkins: One moment, if your Honor please. I objected to that, because he said he outlined in the letter his position, as he stated.

Mr Allen: If your Honor please, he is simply using the letter which he wrote to refresh his memory; that is the only purpose of it.

Mr Hopkins: He said he stated what he had stated in his

letter. If he has got it in writing there, why that is the best evidence of it.

The Court: Have you got the letter?

Mr Allen: If your Honor please, that is a letter written to somebody else connected with the company, about the conversation, and simply hearsay as far as that conversation is concerned now.

Mr Peffers: Well, if the court please, the witness has said, as the Senator said, "I stated my position in a letter," and there is the letter.

The Court: You may state what was said, you may state what you said.

Mr Allen: Q Mr. Cole, I am trying to find out what you stated to these people with reference to furnishing more goods?

483 Mr Hopkins: Now, wait, wait. If your Honor please I want counsel, when he asks a question, to let the witness answer it and not instruct him.

The Court: I think he understands the question. Do you, Mr. Cole?

A Yes, sir. It has been some years ago, and I would like to think it over a minute.

Mr Peffers: Isn't that the letter you have in mind (Indicating)?

Mr Allen: Wait a minute, Mr. Peffers. We are not talking about that letter.

Mr Peffers: All right, all right.

Mr. Hopkins: Well, if his memory is not the same as the letter, we have the right to cross examine him on it.

A My recollection is that it was stated to the office of the Trust Company that we were not in a position to comply with the request regarding shipment of—further shipment of materials to the Naval Training Station—

Mr Peffers: Just a minute. Are you stating the contents of a letter?

A No, sir. I am stating what the conversation was. There was some talk, I believe, about an advance in prices. They asked that we furnish completing materials at the Naval

Training Station at the same price that we had furnished
484 them to W. H. Schott, and it was stated that owing to an advance in the raw products, and the advance in cost in manufacture, that we would be unable to furnish the goods at the old price.

Mr Allen: Q Now, Mr. Cole, did you have any understand-

testimony of
Albert B.
Cole.

ing with the officer there as to who would have to undertake to pay for these goods that you shipped them?

Mr Peffers: That is objected to.

Mr Hopkins: Yes, that calls for a conclusion.

Mr Allen: No, there is no conclusion about that.

Mr Hopkins: Oh, yes. Dont answer that, Mr. Cole.

A Well—

Mr Allen: Wait just a minute, Mr. Cole.

Mr Peffers: We object to the question.

Mr Allen: Read the question please.

Mr Hopkins: It calls for a conclusion.

(Question read).

Mr Peffers: I understand, if the court please, it is for the court and jury to say whether there was an understanding.

The Court: If the witness can state what occurred there, then he ought to testify.

Mr Allen: Q What occurred there, Mr. Cole, with reference to the undertaking to pay for these goods, if they were furnished to the receiver?

A We stated to the receiver they would have to pay for the goods.

485 Q As a matter of fact, have we included in our claim in this suit any goods furnished to the receiver?

A No, sir.

Q Were any of these goods which are included in our bill of particulars here, goods furnished after Schott or the Engineering Company went into bankruptcy?

A I think not.

Mr Allen: That is all.

Cross-Examination by Mr. Peffers.

Q Now, Mr. Cole, as a matter of fact, you did receive a large number of orders from the Central Trust Company, as trustee of the Schott Engineering Company, for the Naval Training Station? You did ship a large amount of stuff on their orders, didnt you?

A I dont remember.

Q Did you handle the orders, do you know?

A Yes, sir.

Q Are these carbon copies of the orders that you received, do you recognize them?

A The first one is not a carbon copy of the order.

Q Have you the written orders from the Central Trust here?

A The first letter refers to shortage on previous orders.

Mr Allen: We have no orders at all, Mr. Peffers.

Mr Peffers: What is that?

486 A The first letter refers to shortage on previous orders.

Q Isnt that a letter which you received from—

A We received this letter, yes sir.

Q That is what I am getting at. That is right, that refers to a shortage in a back order.

A Yes, sir.

Q Of the Engineering Company. Well, now, when this letter of February 28th—dont you recognize that as an order from the Central Trust, as trustee?

A Yes, sir.

Q Turn over to the other, so that we can get along as fast as we can, I dont want to take any more time than necessary. Glance over them and see if those are the orders, copies of them.

(Witness examines documents).

Q That is the correspondents, is it not, that you had with the Central Trust Company as trustee?

A As far as I know.

Mr Peffers: I want to offer them, if the court please. And that is the material referred to in these orders, that is what you answered counsel for the claimant was the stuff that the railroad shipped up there, and for which you had been paid by the receiver of the Schott Engineering Company or trustee?

A I could not say as to that.

487 Q Well, you have told him that you had been paid for all of that that was shipped—

Mr Allen: I didnt state that Mr. Peffers. Beg pardon, Mr. Peffers.

Mr Peffers: Q Didn't the receiver pay you for the stuff?

A Yes, sir.

Q Yes. Well now, isnt the stuff that you shipped—was it on the orders that I have shown you, isnt that correct?

A As far as I know, yes sir.

Q Yes. Now, Mr. Cole, I show you a letter dated May 24th, and ask you if that is a letter that your company wrote, referring at the bottom to balance of \$2,107.99 from the Engineering Company.

Mark this here, Exhibit 13. Mark that Exhibit 14.

(The documents were marked as requested).

Q I show you a letter dated June 24th, addressed to Schott,

Testimony of
Albert B.
Cole.

care of the Engineering Company, and ask you to identify the letter and the bill attached?

A The letter and the stamp made up in our office—

Mr Peffers: Mark that Exhibit 15.

(The document was marked as requested).

Q I show you a letter dated June, 7, 1909, addressed to the Schott Engineering Company, and ask you to identify that as the signature of your treasurer and manager. That is a letter which I will ask to have marked Exhibit 16, which you people sent.

488 A Yes, sir.

Q And also this one of August 26, 1909?

A Yes, sir.

Q Identify that?

A I can identify both of them.

Mr Peffers: Mark this.

(The document was marked Exhibit 17).

A Sent out by our company.

Q That refers to exhibits 16 and 17.

Mr. Cole, I show you a carbon copy of a letter dated December 9, 1909, addressed to your company by the Schott Engineering Company, and a letter dated December 16, 1909, purporting to be a reply. I wish you would identify those please.

A I can identify those.

Mr Peffers: Mark this Exhibit 18.

(document was marked as requested).

Mr Peffers: I desire to offer these letters in evidence, if your Honor please, which have been identified by the witness. The first is marked Exhibit 13, and it contains a large batch of correspondence between the Central Trust Company, as trustee of the Schott Engineering Company, and contains a number of orders addressed to the Western Roofing & Supply Company, signed by the Central Trust Company as trustee of the Schott Engineering Company.

The first letter is one of February 23, 1909, and refers to a shortage in prior orders. The letter starts out, "Regarding shortage on Schott Engineering Company's order 4350," and then relates to a shortage, and then they ask them to ship the stuff. The others are orders—correspondence with reference to those. I will not take the time to read those, because they are a large batch, but that is the substance of it.

(Which said Defendant's Exhibit 13 is in the words and figures following, to-wit):

490 Western Roofing & Supply Co.,
Chicago, Ill.

Feb. 23rd, 1912.

Defendant's
Exhibit 13.

Gentlemen:—

Re: The Schott Engineering Company Receivership.

Regarding shortage on The Schott Engineering Company's order #4350, which was given you before the company became bankrupt, we find as Receiver for The Schott Engineering Company in checking back against order #4350 that you were still short in your shipments the following amounts of special pipe covering:—

577	ft.	—	7"	Steam	Covering
893	"	—	6"	"	"
242	"	—	5"	"	"
1300	"	—	1"	"	"
358	"	—	$\frac{3}{4}$ "	"	"

2982	"	—	10"	Water	Covering
726	"	—	6"	"	"
115	"	—	$1\frac{1}{2}$ "	"	"

Now will you please ship immediately to A. L. Closterhouse, North Chicago, Ill., c/r the Naval Training Station—

577	ft.	—	7"	Steam	Covering
893	"	—	6"	"	"
242	"	—	5"	"	"
1300	"	—	1"	"	"
358	"	—	$\frac{3}{4}$ "	"	"

2982	"	—	10"	Water	Covering
726	"	—	6"	"	"
115	"	—	$1\frac{1}{2}$ "	"	"

Covering to be identical with that, that was to be furnished The Schott Engineering Company, bankrupt, on their order #4350. Western Roofing & Supply Co.

Bill the same to the Central Trust Company of Illinois, Trustee The Schott Engineering Company.

Your immediate attention will oblige

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.

Per

M.McD.—S.

February 28th, 1910.

Western Roofing & Supply Co.,
Chicago, Ill.

Gentlemen:

Re: The Schott Engineering Co. Trusteeship.

Please ship at once to A. L. Closterhouse, North Chicago, Ill., c/r The U. S. Naval Training Station, the folloying:—

150 yds. — 7 oz. Canvas

billing the same to The Central Trust Company of Illinois
Trustee The Schott Engineering Company.

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee The Schott Engineering Co.
Per

M.McD. — S.

492 Western Roofing & Supply Company,
Chicago, March 12th, 1910.

Central Trust Company,
152 Monroe Street,
Chicago, Ill.

Trustee Schott Eng. Co.

Gentlemen:

We enclose herewith your letter of February 23rd, in reference to additional covering required at North Chicago, and will say that the price on this covering, made the Schott Engineering Company is 70% off for the Steam Pipe Covering, and 75%-10% for the Water Covering.

We requested our factory to make immediate shipment of this material, and same will no doubt be forwarded the first of next week.

Kindly send us your formal order, made out as requested by the writer, and oblige

Yours very truly,

WESTERN ROOFING SUPPLY Co.

E. S. MAIN

Mgr. Insulation Department.

ESM/IJ

493

March 14th, 1910.

Defendant's
Exhibit 13.

Western Roofing & Supply Co.,
2355-59 La Salle St.,
Chicago.

Gentlemen:

In Re: The Schott Engineering Co. Trusteeship.
Please ship at once, via C. H. & D. & S. & N. W. Ry. to A. L. Closterhouse, North Chicago, Ill. c/r The U. S. Naval Training Station, the following covering:

577 ft.	7"	Schott Diamond Brand Steam Covering
893 "	6"	" " " " " "
242 "	5"	" " " " " "
1300 "	1"	" " " " " "
358 "	$\frac{3}{4}$ "	" " " " " "
70% F. O. B. North Chicago, Ill.		
2982 ft.	—10"	Schott Diamond Brand Water Covering
726 "	6"	" " " " " "
115 "	$1\frac{1}{2}$ "	" " " " " "
75%-10% F. O. B. North Chicago, Ill.		

It is our understanding that upon receipt of this order, the covering above specified will go forward the first of this week.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, *The Schott Engineering Co.*
Per

MOP-S

494

Western Roofing and Supply Co.,
Chicago, March 18, 1910.

Central Trust Company of Illinois, Trustee,

The Schott Engineering Company,
315 Dearborn St., Chicago.

Gentlemen:—

We beg to acknowledge receipt of your favor of the 14th ordering Schott Diamond Brand Steam and Water Covering. In order to make the record of this order complete you will note that the order is given and accepted as an independent transaction between ourselves and bears no relation to the agreement formerly existing between us and the Schott Engineering Company, and that the goods ordered are to be paid for in cash by yourself.

Defendant's
Exhibit 13.

We will be pleased to have a line from you indicating that this understanding is correct.

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

W. C. IGNATIUS,

Treas. & Asst. Mgr.

WCI-O

Mat'l. shipped today, should be delivered by next week.

495

March 19th, 1910.

Western Roofing & Supply Co.,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Referring to your favor of March 18th, regarding Schott Diamond Brand Steam and Water Covering to be shipped to North Chicago, Ill., it is understood by us that you are to bill us for this covering and upon receipt of the covering and correct bill covering the same, it will be properly vouchered and you will receive a check direct from us in payment of same.

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

MOP-S.

Western Roofing and Supply Co.,
2355-59 La Salle St.,

Chicago, March 25th, 1910.

Central Trust Company of Illinois,
Trustee for The Schott Engineering Co.,
315 Dearborn St., City.

Gentlemen:

Confirming our telephone conversation, we enclose bill of lading covering shipment of special covering to U. S. Naval Training Station, North Chicago, Ill., invoice for which 496 will be sent you under separate cover.

Yours very truly,

WESTERN ROOFING & SUPPLY CO.,

A. B. COLE,

ABC/EB

Insulation Department.

April 4th, 1910.

Defendant's
Exhibit 13.

Western Roofing & Supply Co.,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.
Herewith paid freight bill receipt No. 592 amounting to
\$7.20 covering freight on carload of pipe covering, C. B. &
Car No. 42369, shipped March 24th to A. L. Closterhouse,
North Chicago, Ill.

Please send us credit memorandum to cover, together with
paid freight bill on an early mail and oblige

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,

Trustee, The Schott Engineering Co.

Per

S

7

Western Roofing and Supply Company

2355-59 La Salle St.,

Chicago, Apr. 7th, 1910.

Central Trust Co. of Ill., Trustee,

W. H. Schott Engineering Co.,

315 Dearborn St., Chicago.

Gentlemen:—

We enclose herewith credit memo. for \$97.20 covering
freight on C. B. & Q. Car No. 42369. Please deduct this amount
from the balance of your account, leaving a balance due of
\$1,514.65, for which we will thank you to send us check by
return mail.

Very respectfully,

WESTERN ROOFING & SUPPLY Co.

APD-O

A. P. DAVENPORT.

Western Roofing and Supply Company

2355-59 La Salle St.,

Chicago, April 20, 1910.

Central Trust Co. of Ill., Trustee,

W. H. Schott Engineering Co.,

315 Dearborn St., City.

Gentlemen:—

As we could use the money to very good advantage we trust
you will arrange to let us have your check for \$1,514.65 before
the end of this week.

498 Thanking you in advance for any special efforts on your
part, we are

APD/D

April 27th, 1910.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Will you please ship at once to A. L. Closterhouse, North Chicago, Ill. c/r of the U. S. Naval Training Station, via C. & N. W.

100 yds. of 6 oz. canvass
billing the same to the Central Trust Company of Illinois,
Trustee, The Schott Engineering Company.

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-S

499

May 20th, 1910.

Western Roofing & Supply Co.,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Confirming verbal order of Mr. Greist of even date, you will please ship to A. L. Closterhouse, North Chicago, Ill., c/r The U. S. Naval Training Station, at once via C. & N. W. Ry.

400 ft. — 1" "Schott Diamond Brand Steam Pipe Covering
250 " 3/4" " " " " " " " " " " " "

invoicing the same to the Central Trust Company of Illinois,
Trustee The Schott Engineering Co.

Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
Per

P-s

May 25th, 1910.

Western Roofing & Supply Company,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Confirming our 'phone order to you of even date, you will

lease ship at once to A. L. Closterhouse, North Chicago, Illi- Defendant's
ois, c/r The U. S. Naval Training Station, Exhibit 13.
100 yds. — 7 oz. Canvas.
12 bags — asbestos, plastic Cement
invoicing the same to the Central Trust Company of Illi-
ois, Trustee, The Schott Engineering Company.
Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
P-S Per

June 6th, 1910.

Western Roofing & Supply Company,
24th & La Salle St.,
Chicago.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.
Please ship at once via the C. & N. W. Ry. to A. L. Closter-
house, North Chicago, Ill. c/r the Navel Training Station,
15 bags of asbestos cement and
100 yds. of 7 oz. canvas,
invoicing the same to the Central Trust Company of Illinois,
Trustee, The Schott Engineering Company.
Very truly yours,
CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.
P-S Per

501 Western Roofing and Supply Company,
2355-59 La Salle St.,
Chicago, June 14, 1910.

Central Trust Company of Illinois,
Trustee Schott Engr. Company,
Chicago, Illinois.

Gentlemen:—

We note your account shows a balance due of \$12.50 cover-
ing invoice of May 3. We will thank you to kindly favor us
with check to cover at an early date, and oblige

Yours very truly,
WESTERN ROOFING & SUPPLY COMPANY.

APD/D

A. P. DAVENPORT

June 18th, 1910.

Western Roofing & Supply Company,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship.

Confirming our 'phone order of the 16th inst. you will please ship by express to A. L. Closterhouse, North Chicago, Ill. c/r The Naval Training Station.

50 yds. of 7 oz. canvas

502 invoicing the same to the Central Trust Company of Illinois, Trustee, The Schott Engineering Company,

Very truly yours,

CENTRAL TRUST COMPANY OF ILLINOIS,

Trustee, The Schott Engineering Co.

P-S

Per

Western Roofing and Supply Company,
2355-59 La Salle St.,

Chicago, Aug. 11th, 1910.

Central Trust Co. of Illinois,
Chicago, Ill.

Gentlemen:—

As per your request we enclose herewith duplicate invoices covering our charges against you under date of June 7th and 27th.

Trusting you will find these bills O. K. and that remittance will be forthcoming at an early date, we are

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

A. P. DAVENPORT,

Financial Department.

APD/O

6-7-27—\$80.04

503

June 29th, 1910.

Western Roofing & Supply Co.,
2357 La Salle St.,
Chicago, Ill.

Gentlemen:—

In Re: The Schott Engineering Co. Trusteeship:

We beg to confirm the writer's 'phone conversation with you of the 27th inst., ordering to be shipped to A. L. Closterhouse, care of Naval Training Station, North Chicago, Illinois the following:—

100	brass	lacquered	bands	for	1"	pipe	covering
200	"	"	"	"	2½"	"	"
100	"	"	"	"	6"	"	"
50	"	"	"	"	12"	"	"

You will invoice the above to the Central Trust Company of Illinois, Trustee, for The Schott Engineering Company.

Thanking you for your usual prompt attention, we are

Yours very truly,

CENTRAL TRUST COMPANY OF ILLINOIS,
Trustee, The Schott Engineering Co.

MOP-C

Per

504

November 29th, 1909.

Western Roofing & Supply Company,
Chicago, Ill.

Gentlemen:—

Re: Shortages On Our Orders:

Herewith find record of our orders #4336, Sept. 3rd, and order #4350, Sept. 4th, which looks bad so far as complete shipments of the orders are concerned and the time which orders have been in. Your immediate attention and shipments on these shortages will be appreciated:—

Order #4336:—Sept. 3rd—

We Ordered	You Shipped	Still Short
178 ft. - ¾" Steam Covering	None	178' ¾" Steam co.
259 " - 1" " "	"	259' 1" " "
245 " - 1½" " "	180 ft. 1½"	65' 1½" "
711 " - 1½" " "	711 ft. 1½"	Complete
121 " - 4" " "	123 ft. 4"	"
340 " - 5" " "	342 ft. 5"	"
35 " - 1½" Water	36 ft. 1½"	"
45 " - 2" " "	45 ft. 2"	"
3010 " - 2½" " "	2667 ft. 2½"	343' 2½" Water
3598 " - 3" " "	3357 ft. 3"	241' - 3" "
180 " - 3½" " "	180 ft. 3½"	Complete
410 " - 4" " "	411 ft. 4"	"
50 " - 4½" " "	51 ft. 4"	"
100 " - 5" " "	102 " 5"	"
1020 " - 6" " "	975 " 6"	45' 6" Water Cov.

Defendant's
Exhibit 13.

Order #4350: Sept. 4th—

505 We Ordered

705 ft. - 9" Steam Cover
 640 " - 7" " "
 1982 " - 6" " "
 335 " - 5" " "
 140 " - 4" " "
 595 " - 1½" " "
 20 " - 1½" " "
 1602 " - 1" " "
 520 " - ¾" " "
 832 " - 12" Water Cover
 4593 " - 10" " "
 515 " - 9" " "
 1824 " - 6" " "
 1318 " - 5" " "
 75 " - 4½" " "
 40 " - 4" " "
 34 " - 3½" " "
 684 " - 3" " "
 325 " - 2½" " "
 115 " - 1½" " "

You Shipped

None
 " "
 729 ft. 6"
 42 " 5"
 141 " 4"
 453 " 1½"
 21 " 1½"
 None
 " "
 696" - 12"
 690" - 10"
 375" - 9"
 777" - 6"
 1242" - 5"
 75" - 4½"
 42" - 4"
 None
 " "
 " "
 " "

Still Short

705' - 9" Steam Cov.
 640' - 7" " "
 1253' - 6" " "
 293' - 5" " "
 Complete
 142' - 1½" " "
 Complete
 1602' 1" " "
 520' - ¾" " "
 123' - 12" Water Cov
 3903' - 10" " "
 140' - 9" " "
 1047' - 6" " "
 76' - 5" " "
 Complete
 " "
 34' - 3½" " "
 684' - 3" " "
 325' - 8½" " "
 115' - 1½" " "

Very truly yours,

THE SCHOTT ENGINEERING COMPANY.

Vice President.

MOP—S

Defendant's
Exhibit 14.

506 Mr Peffers: The next one is marked Defendant's Exhibit 14. It is on the letter head of the claimant, Western Roofing & Supply Company, dated May 24, 1909, addressed to W. H. Schott Engineering Company.

(Which said Defendant's Exhibit 14 is in the words and figures following, to-wit):

Western Roofing and Supply Company

Chicago, May 24, 1909.

W. H. Schott Engineering Co.,

1100 American Trust Bldg., Chicago, Ill.

Gentlemen:

We enclose herewith a statement of your account on which you will note we have entered credit for the material returned from the car of February 16th.

We can use the funds to very good advantage, and as this matter has now been entirely adjusted we will thank you to kindly favor us with check in settlement of the February item less credit by return mail, and greatly oblige

Very respectfully,

WESTERN ROOFING & SUPPLY Co.

WCI-O

2-16-5-11—\$2107.99

507 Mr Peffers: Down at the bottom are two items, 2-16 and 5-11, which refers to two bills theretofore been rendered to the Schott Engineering Company, being a total amount of \$2,107.99.

Testimony of
Albert B.
Cole.

Now, this letter of June 24th which I will read is addressed to W. H. Schott, care of the Schott Engineering Company. "We enclose herewith statement of your account," etc. The bill which the witness identifies is addressed to the W. H. Schott Engineering Company, and is dated June 24, 1909, on the same date as this letter, and is for \$2,107.99, the same amount referred to in the May letter, and referring to bills dated 2-16 and 5-11. 2-16 refers to February 16th, and 5-11 to May 11th.

Q Now, Mr. Cole, I want to ask you one question, so that the jury will get it straight. That first item on this invoice that you sent here, and identified, dated 6-24-09, for \$979.00,—that is for the first shipment, is it not, in February, 1909?

A That I could not say.

Q Well, have you examined in the bill of particulars to know that the first amount—where is that bill?

Mr Allen: That was shipped on February 18th, Mr. Peffers.

Mr Peffers: No, it was not shipped at all then. That is the date of your bill.

508 Mr Allen: Well, I thought they were the same.

Mr Peffers: That \$979.00 on the bill of particulars refers to the same item, does it not?

A I think it does.

Q Well, there is no doubt about it, is there? The \$979.00 mentioned on that invoice—

A Well—

Q Wait until I finish my question. The \$979.00 referred to on the invoice of June 24, 1909, attached to Exhibit 15, refers to the same item shown on the bill of particulars, \$979.00, isn't that correct?

A I think it is.

Q After that—where is that credit memorandum? After that you sent the Schott Engineering Company a credit memorandum for \$367.85?

A I don't remember the amount. We sent them credit memorandums.

Q Well, that is the credit memorandum there that Mr. Allen offered in evidence, isn't it?

Testimony of
Albert B.
Cole.

A This is credit memorandum applying on the first shipment.

Q On the first shipment?

A Yes.

Q And that is the same—it is the credit memorandum which you have in your hand, dated May 13th—the same \$367.85 as mentioned on that bill, isn't it?

A I think it is.

Q Yes.

Mr Allen: Let me see that.

(Which said Defendant's Exhibit 15 is in the words and figures following, to-wit):

Defendant's
Exhibit 15.

509 Western Roofing and Supply Company
Chicago June 24, 1909.

Mr W. H. Schott,
The Schott Engineering Co.,
American Trust Bldg., Chicago.

Dear Sir:

We enclose herewith a statement of your account, which according to terms extended is now due, and as we are urgently in need of the funds just at this time we will thank you to please arrange to favor us with check in settlement by return mail, and greatly oblige.

Very respectfully,

WESTERN ROOFING & SUPPLY Co.

WCI—O

Western Roofing and Supply Co.

Chicago, 6/24. 1909.

W. H. Schott Eng. Co.

1100 Amer. Trust Bldg.,
City.

09/2/16	50	979.00	
5/11		1496.84	
			2475.84
5/13	Cr.		367.85
			<hr/> 2107.99

510 Mr Peffers: Now, the other exhibits which I offered—the next one is Exhibit 16, it is dated June 7, 1909, addressed to the Schott Engineering Company, American Trust Building, Chicago.

(Which said Defendant's Exhibit 16 is in the words and figures following, to-wit):

Defendant's
Exhibit 16.

Western Roofing & Supply Company.

Chicago, June 7th, 1909.

The Schott Engineering Co.,
American Trust Bldg., Chicago.

Gentlemen:

As per your request we enclose herewith duplicate invoices covering our charge of February 16th on which we issued credit as of May 13th. We trust that all of this is correct and that we can now look for check in settlement of the account. We might say that we will authorize the deduction of 2% for cash on invoice of May 11th providing your check reaches us by the 10th.

Thanking you for past favors, we are,

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

W. C. IGNATIUS.

Treas. & Asst' Mgr.

WCI—O

511 Mr Peffers: The next letter is marked Defendant's Exhibit 17, and is a letter dated August 6, 1909, to the W. H. Schott Engineering Company, from the Western Roofing & Supply Company.

Defendant's
Exhibit 17.

(Which said Defendant's Exhibit 17 is in the words and figures following, to-wit):

Western Roofing and Supply Company.

Chicago, Aug. 26th, 1909.

W. H. Schott Engr. Co.,
1100 American Trust Bldg., Chicago.

Gentlemen:

We beg to acknowledge receipt of your recent favor enclosing check in settlement of February and May invoices, for which please accept our thanks.

We enclose herewith a revised statement, which we trust you will find in accord with your record and on which we will appreciate your further remittances.

Thanking you for past favors, we are

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

WCI—O

2409.43

Defendant's
Exhibit 18.

512 Mr Peffers: Then this letter of December 9th, marked as our Exhibit 18, to the Western Roofing & Supply Company; this is written by the Schott Engineering Company. (Which said Defendant's Exhibit 18 is in the words and figures following, to-wit):

Dec. 9, 1909.

Western Roofing & Supply Co.,
24th & LaSalle Sts.,
Chicago, Ills.

Gentlemen:

We return herein your invoice of Nov. 19th. (No. 15548) as there are a number of errors thereon that should be corrected. Kindly send us a corrected bill for this at your earliest opportunity, so that the invoice may be embodied in our Nov. accounts.

Will you also kindly inform us if the items on your invoice of Nov. 19th. (No. 15549) amounting to \$108.93 were shipped in car #4280. Your invoice does not show the car number altho we have asked you several times to always show the car number on invoices.

Awaiting your prompt reply, we are,

Very truly yours,

SHOTT ENGINEERING CO.,

by SCOTT
Auditor.

Dict. S.

513 Mr Peffers: Then the reply to that letter, on December 16th.

(Which said letter is in the words and figures following, to-wit):

Western Roofing & Supply Company

Chicago, Dec. 16th, 1909.

The Schott Engineering Co.,
315 Dearborn St., Chicago.

Gentlemen:

Replying to your favor of the 9th we beg to enclose herewith corrected invoice of November 19th—\$545.97, which we trust you will find O. K.

Our invoice for \$108.93 was shipped in this same car.

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

W. C. IGNATIUS,
Treas. & Asst. Mgr.

WCI—O

Testimony of
Albert B.
Cole.

514 Mr Peffers: Now, give me the circular letter.

Mr Allen: I did not bring that. I did not know that you wanted it. We will admit we got the same letter that was introduced here yesterday.

Mr Hopkins: Yes.

Mr Peffers: You remember, Mr. Cole, the letter that you referred to that came from the Central Trust Company, after the bankruptcy proceedings?

A Yes.

Q That was true, such a letter was received, that is a copy of it?

A Yes.

Mr Peffers: It is admitted that is a copy of it?

Mr. Hopkins: Yes, it is admitted—

Mr Allen: I want to say that we object to that for the same reason that Mr. McKenzie did. It is immaterial to the issues in this case.

Mr Peffers: All right.

Q You remember receiving that circular letter from Pam & Hurt, and the Central Trust Company?

A I think that was received.

(The said letter is identical with the one which appears in this bill of exceptions, as defendant's Exhibit "A" being the circular letter sent out to creditors of the Schott Engineering Company by the Central Trust Company Receiver of the Engineering Company.

515 Mr Peffers: Q And you remember writing that reply that you made?

A I remember this reply was made.

Q Yes.

A But I did not write that letter myself.

Q You remember that it was made?

A Yes sir.

Mr Peffers: Mark that Exhibit 19.

The document was marked as requested.

Mr Peffers: We offer in evidence, if your Honor please, letter dated February 8, 1910, marked Defendant's Exhibit 19, addressed to the Central Trust Company, from the Western Roofing & Supply Company.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked defendant's Exhibit 19, is in the words and figures following, to-wit:—

Defendant's
Exhibit 19.

516

Feb. 8th, 1910.

Central Trust Co., Receivers,
Messrs. Pam & Hurd, Attys.,
152 Monroe St., Chicago.

Gentlemen:

Replying to your communication of recent date with reference to the adjustment of the contract of the W. H. Schott Engineering Co. with the U. S. Government at North Chicago. We feel that the advantageous thing to do would be to complete the contract and distribution of all moneys received from the government after the contract is completed should be distributed to the creditors who have supplied materials on this particular job in whatever percentage their amount may be to the total of the contract. This should by all means be done as we are under the impression that some of the creditors on this particular contract were preferred and have received a greater portion of their account than others who may not have been pressing the Engineering Company quite as hard for settlement. In this way the entire contract would be opened up and any one or more creditors who have not been paid the same percentage as others should receive his proportion of the entire amount considering that which has already been paid.

We realize of course that this is simply in the way of a suggestion and that the court rules in the matter, but feel that this stand should be taken as the just and proper one to all concerned.

Trusting that you will keep us advised as to proceedings we are

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

by W. C. IGNATIUS

Treas. & Asst. Mgr.

WCI—O

517 Mr Peffers: Q Now, Mr. Cole, you filed a claim, did you not, before the referee in bankruptcy, against the Schott Engineering Company, do you remember that?

A I think we did.

Q Have you the claim?

The Court: Have you got the claims?

The Clerk: I have sent for them.

The Court: They haven't come in yet.

Mr Allen: We will admit we filed such a claim, if counsel for the surety company will admit we also filed one for the same amount against W. H. Schott individually.

Mr. Peffers: I don't know about that.

Mr. Hopkins: We are not required to admit anything.

Mr Allen: We will both get the proof then.

Mr Hopkins: All right, prove anything you have.

The Court: They will be here any time now.

Mr. Peffers: Q Mr. Cole, I show you a carbon copy of a letter from the Schott Engineering Company, dated September 22, 1909, and ask you to identify that as being a letter received by your company, if you can.

A Yes sir, I remember this letter.

Q You got the check, did you, therein mentioned?

A Yes sir.

Q And this letter, dated July 16—mark that letter there Exhibit 20.

The document was marked as requested.

518 A I think this letter was received.

Mr Peffers: Mark this other one Exhibit 21.

The document was marked as requested.

Mr Peffers: Do you want to see these?

Mr Allen: Yes.

Mr Peffers: Pardon me?

Counsel examined letters.

Mr Peffers: I offer in evidence the letter identified by the witness, and marked defendant's exhibit 20, dated September 22, 1909, addressed to the Western Roofing & Supply Company, 24 La Salle street, Chicago.

Which said letter last above referred to, so offered and received in evidence as aforesaid marked defendant's exhibit 20, is in the words and figures following, to-wit:—

“September 22, 1909.

Defendant's
Exhibit 20.

“Western Roofing & Supply Company

“24 La Salle street, Chicago:

Gentlemen: We haven't heard anything from you since we wrote you on the 16th inst., in regard to some little corrections in your statement of September 1st, and would be glad to hear from you at your earliest convenience.

519 “In the meantime, as probably a little cash will not go amiss, we have the pleasure of handing you herewith our check for \$500.00 on account, and hope in the early future

Defendant's
Exhibit 20.

to send another remittance. Kindly acknowledge receipt, and oblige,

“Very truly yours,

“SCHOTT ENGINEERING COMPANY,”

By its Treasurer.

Defendant's
Exhibit 21.

Mr Peffers: And also letter marked defendant's exhibit 21, dated July 16, 1909.

Which said letter last above referred to, so offered and received in evidence as aforesaid, marked defendant's exhibit 21, is in the words and figures following, to-wit:—

“July 16, 1909.

“Western Roofing & Supply Company

“23-55 La Salle street, Chicago.

“Gentlemen:

“Acknowledging your favor of the 13th inst. with enclosure, we ask for further consideration for a few days, when we expect to take up your account and other accounts in settlement of amounts due. Thanking you in advance for the courtesy, we remain,

“Very truly yours,

“SCHOTT ENGINEERING COMPANY.”

By its Treasurer.

520 Mr Peffers: Q Now, do you remember when the first order came in from the Schott Engineering Company?

A Yes sir.

Q Did it come into your hands?

A Yes sir.

Q Did you take any steps to find out why you received an order from the Schott Engineering Company instead of from Schott personally?

A My recollection is that I did not.

Q The first order that you ever received, and the only one you ever received at all from Schott was this one that counsel read from, isn't it? What is the number of that, please, Mr. Allen? 3833, I mean there; 3833, or 3933?

A 3833.

Q 3833. Now, that was from Schott, wasn't it, Schott individually?

A That was signed by W. H. Schott, I think, and on their order head.

Q There is a difference, isn't there, between the 3833,

all of these subsequent orders that you received, isn't it?
re?

A Not according to our understanding.

Q I mean, on the face of the papers that is so, isn't it?

A There is some difference in the printing on the orders,
sir.

Q As a matter of fact—where is that order that you
referred to, Mr. Allen?

Mr Allen: It is in one of these books here.

Mr Peffers: You had it here.

Mr Allen: I will find it, Mr Peffers.

Mr Peffers: Q Now, that is signed here W. H. Schott,
isn't it?

A Yes.

Q That is the order that you referred to?

A Yes sir.

Q Every other order that you received after that was
Schott Engineering Company," wasn't it?

A I think nearly all of them were.

Q There is no doubt about that, is there?

A I am not sure about that.

Mr Peffers: That is all.

Re-direct Examination by Mr. Allen.

Q Mr. Cole, in defendant's exhibit 15 here—Mr. Peffers
saw a bill of June 24. I simply do not want any misunder-
standing. That bill was for goods shipped to when? The
\$79.00 item?

Mr Peffers: Is there any doubt—

Mr Allen: The record state, or the bill states that was for
June 16.

Mr Hopkins: The bill is—

A My recollection is, they were shipped in February,
22 the same month.

Mr Peffers: There is only one item on your account
of \$79—well, that is all right, it speaks for itself.

Mr Allen: Q Mr. Cole, I will ask you to compute the in-
terest, after you leave the stand. We will put him on later
for that purpose.

Mr Peffers: All right.

Mr Allen: We have omitted that.

Mr Peffers: Yes.

Testimony of
Albert B.
Cole.

Mr Allen: The interest to date.

Mr Peffers: That is all right.

Mr Allen: Mr. Peffers spoke of the first order which he has just shown you. That is the first order for a specific amount of goods following the original contract, is that not a fact?

Mr Peffers: I object to that characterization, if the Court please.

The Court: Sustained.

Mr Allen: Q Is this the first order that Mr. Peffers speaks about, the first order that you had for goods?

A We accepted that as the first order applying on the original contract.

Mr Peffers: I move to strike that out, if your Honor please.

The Court: Strike it out. Can you answer the question whether it was the first one?

523 A I think that was the first order.

Mr Peffers: I ask the same thing to that answer.

Mr Allen: I do not want to have any misunderstanding on this order, your Honor. That was not the same as an order which would be sent in by a person who had never had any dealings with you, was it?

Mr Peffers: That is objected to.

A No.

Mr Hopkins: That is objected to.

The Court: Sustained.

Mr Allen: You had to put—did you have to put under which piece these goods were furnished?

Mr Hopkins: That is objected to. That has all been gone over two or three times.

The Court: What was the testimony? What does the testimony show? Was there an original order here, and later on a later one applying—

Mr Peffers: Nothing except sales, where our friend Smith got there and he captured the order from Schott.

The Court: Oh, yes; I had forgotten Smith's testimony.

Mr Allen: I want it to be understood that order is not the first one that passed.

Mr Peffers: No.

Mr Allen: That the order followed that contract.

Mr Peffers: The testimony speaks for itself on that.

524 The Court: Oh yes. It is perfectly clear that he had

blanket order, the travelling man took a blanket order for all of the goods.

Mr Allen: Why, what was this blanket order, first with reference to the amount of goods to be furnished?

Mr Hopkins: I object to that. That has all been gone over. There is no point in that.

The Court: Well, he may answer, if he knows.

A My recollection is, that it stated the prices at which the covering was to be furnished—

Mr Peffers: If your Honor please—

The Court: The same question that you asked Mr. Smith yesterday.

Mr Allen: Go ahead, Mr. Cole.

Mr Peffers: I want to interrupt just a minute, Mr. Cole. The gentleman here don't want to leave the orders until the Court tell him to.

The Court: Can they stay here?

Mr Peffers: They belong here.

A Voice: They have got to go back just as quick as I can get back.

The Court: You can leave them here then.

Mr. Allen: Go ahead, Mr. Cole.

Mr Hopkins: Go ahead on what?

The Court: He is to continue his answer about that order.

25 A The order stated the prices at which the covering was to be furnished; the place at which the covering was to be used; and a list of covering was attached thereto, with the order was a list of covering on which that price was to apply, an approximate amount.

Mr Allen: That is all.

Mr Hopkins: That is all.

26 ALBERT B. COLE recalled as a witness on behalf of the claimant, Western Roofing & Supply Company, having been previously been duly sworn, was examined in chief by Mr. Allen and testified as follows:

Q Deducting all credits for freight, express, and money received on account, what is the final amount due you from W. H. Schott, or the Schott Engineering Company, as the case may be?

Testimony of
Albert B.
Cole.

A Not including interest?

Mr Peffers: Yes.

A \$4,873.41.

Mr Allen: Q How much is the interest from August to yesterday?

A \$429.13.

Q The total is how much?

A \$5,302.54.

Mr Hopkins: Mr. Wyeth, your witness will be here, if we want to use him after lunch, will he?

(Counsel conferred out of hearing of reporter.)

Mr Peffers: If the Court please, I desire to offer in evidence the claim in bankruptcy against the Schott Engineering Company of the Western Roofing & Supply Company, a defendant's exhibit 35.

Which said defendant's exhibit 35 is in the words and figures following, to-wit:—

Defendant's
Exhibit 35.

527 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the Matter of

Schott Engineering Company, } In Bankruptcy.
Bankrupt. } No. 17,328.

United States of America, }
Northern District of Illinois, } ss.
State of Illinois,
County of Cook.

At Chicago, in said Northern District of Illinois, on the 25th day of November, A. D. 1910, came W. C. Ignatius, of the City of Chicago, County of Cook and State of Illinois, and made oath and says that he is Treasurer and Assistant Manager of the Western Roofing & Supply Company, a corporation incorporated under and by virtue of the laws of the State of Illinois, and carrying on business at Chicago, in the County of Cook and State of Illinois; that he is duly authorized to make this proof and says that the said Schott Engineering Company, against whom a petition for adjudication

of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to the aforesaid Western Roofing & Supply Company; that said indebtedness is in the sum of Thirty-four Hundred and Eighty-five Dollars and Eleven Cents (\$3585.11). That the consideration of said debt is as follows: Material furnished for the use of said Schott Engineering Company, and which entered into the construction of a certain heating system of the North Yakima Central Heating Company of North Yakima, Washington; that no part of said debt has been paid; that there are no set-offs or counter claims to the same; that said debt was due on the 30th day of December, A. D. 1909, and is evidenced and set forth in the statement hereto attached marked Exhibit "A," and hereby made a part hereof; that said debt consists of an open account of several items maturing at different dates; that no note has been received for such account, nor any judgment rendered thereon, and that said Western Roofing & Supply Company, has not, nor has any person by its order, or to the knowledge or belief of said deponent for its use, had or received any manner of security for said debt whatever.

Defendant's
Exhibit 35.

W. C. IGNATIUS

Treasurer and Assistant Manager of Western Roofing & Supply Company.

Subscribed and sworn to before me this 29th day of November, A. D. 1910.

M. B. WELLINGTON,

Notary Public.

(Seal)

EXHIBIT "A"

Exhibit "A"
(referred
to).

(Account follows here)

Filed November 29, 1910.

Mr Allen: If your Honor please, I wish to introduce in evidence proof of claim filed in bankruptcy by the Western Roofing & Supply Company against W. H. Schott, as Western Roofing & Supply Company's exhibit 5.

The Court: It may be received. Substitute a copy. These are all records from the bankruptcy court?

Mr. Allen: Yes, if your Honor please.

Mr Hopkins: That is not the same as the other, though.

Mr Allen: I think that is number 5.

The document was marked Western Roofing & Supply Company's Exhibit 5.

Mr Peffers: You will have to make a copy of that and substitute the copy.

Which said document last above referred to, so offered and received in evidence as aforesaid, is in the words and figures following, to-wit:—

Western Roof-
ing & Supply
Co.'s Ex-
hibit 5.

530

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the Matter of
William H. Schott, } In Bankruptcy.
Bankrupt. } No. 17,551.

United States of America,
Northern District of Illinois,
State of Illinois, } ss.
County of Cook.

At Chicago, in said Northern District of Illinois, on the 25th day of November, A. D. 1910, came W. C. Ignatius of the City of Chicago, County of Cook and State of Illinois, and made oath and says that he is Treasurer and Assistant Manager of the Western Roofing & Supply Company, a corporation incorporated under and by virtue of the laws of the State of Illinois, and carrying on business at Chicago, in the County of Cook, and State of Illinois; that he is duly authorized to make this proof and says that the said William H. Schott against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said Western Roofing & Supply Company in the sum of Forty-eight Hundred Seventy-three Dollars and Forty-one Cents (\$4873.41); that the consideration of said debt is as follows: Material furnished and entered into the construction of the Naval Training Station in or near North Chicago, Illinois, under contract of William H. Schott with the United States of America and the Secretary of the Navy thereof; that part of said debt has been paid; that there are not set-

or counter claims to the same; that said debt was due on the 1st day of February, A. D. 1910, and is evidenced and set forth in the statement hereto attached marked Exhibit "A," and hereby made a part hereof; that said debt consists of an open account of several items maturing at different dates; that no note has been received for said account, nor any judgment rendered thereon, and that said Western Roofing & Supply Company, aforesaid, has not, nor has any person by its order, or to the knowledge or belief of said deponent for its use, had or received any manner of security for said debt whatever, except as arises by virtue of a certain bond executed by W. H. Schott, as principal, and Illinois Surety Company, as surety, to the United States of America, in the penal sum of Thirty-one thousand forty-seven dollars and Eighteen cents (\$31047.18), bearing date the 3rd day of August, A. D. 1908, said bond being set forth in Exhibit "B" hereto attached and hereby made a part hereof.

Western Roofing & Supply Co.'s Exhibit 5.

W. C. IGNATIUS

Treasurer and Assistant Manager of Western Roofing & Supply Company.

Subscribed and sworn to before me this 29th day of November, A. D. 1910.

M. B. WELLINGTON

Notary Public.

(Seal)

EXHIBIT "A"

(Account follows here.)

Exhibits "A" "B" (referred to).

EXHIBIT "B."

(Bond follows here.)

Filed November 29, 1910

532 The Court: Is that all?

Mr Allen: That is all.

Mr Peffers: No cross examination.

533 Thereupon the said Illinois Surety Company, defendant, and said W. H. Schott, defendant, rested their respective cases.

And thereupon all the use plaintiffs plaintiffs rested their cases.

all of excep-
tions.

The above and foregoing was and is all of the evidence offered on behalf of said use plaintiffs, the John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, United States Equipment Company, The Roebling Construction Company, The Western Kieley Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Racine Stone Company, Charles A. Daniel, Nancy M. Watrous and Maloney Electric Company, and each of the same, and also on behalf of the defendants Illinois Surety Company and W. H. Scott, and each of them.

534 Thereupon at the close of all the evidence the Illinois Surety Company by its counsel, moved the court to direct the jury to find a verdict in its favor as to each of the claims of the use plaintiffs, and the said W. H. Schott then and there made and entered the same motion.

And thereupon each and all of the use plaintiffs and intervening petitioners moved the court to direct a verdict in favor of said use plaintiffs, and each of them, on their respective claims.

Thereupon the court discharged the jury and stated that he would take the matter under consideration and later on make a special finding of facts in the case and decide on the deposition to be made of the respective claims of the use plaintiffs.

And thereupon the court took said matter under advisement.

Thereupon said cause came on further for hearing on Friday, February 6, A. D. 1914, and after hearing the argument of counsel the court made and entered its findings of fact and conclusions of law on such findings in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

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United States of America, for the use of The John Davis Company, a corporation, Universal Portland Cement Company, a corporation, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, executors of F. Bairstow, deceased, M. H. Hussey, Standard Underground Cable Company, a corporation, George Racky, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, a corporation, United States Equipment Company, a corporation, James P. Marsh & Company, a corporation, Raymond Lead Company, a corporation, George B. Carpenter & Company, a corporation, The Roebling Construction Company, a corporation, The Western Kieley Steam Specialty Company, a corporation, H. W. Johns-Manville Company, a corporation, Davies Supply Company, a corporation, Racine Stone Company, a corporation, Stebbins Hardware Company, a corporation, Commonwealth Edison Company, a corporation, H. Channon Company, a corporation, Nancy W. Watrous Sons, doing business as G. B. Watrous Sons, James B. Clow & Sons, a corporation, Scott Valve Company, a corporation, Featherstone Foundry & Machine Company, a corporation, Electric Appliance Company, a corporation, Western Roofing & Supply Company, a corporation, Charles A. Daniel, trading as Quaker City Rubber Company, and Maloney Electric Company, a corporation,

No. 30486
Debt.

Plaintiffs,

vs.

Illinois Surety Company, a corporation, and
W. H. Schott,

Defendants.

FINDINGS OF FACT.

The Court makes the following findings of fact in this case:

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fact.

1. That on July 30, 1908, the United States Government entered into a contract with W. H. Schott, one of the defendants to this suit, hereinafter for brevity referred to as Schott, for the performance of certain work in connection with the United States Naval Training Station at North Chicago, Illinois, in the Northern District of Illinois, Eastern Division thereof, 536 of, a true and correct copy of which contract is attached to and filed with the declaration in this cause, which contract is made a part hereof by reference, for the sake of brevity, and is herein called the government contract.

2. Thereafter, pursuant to the statutes of the United States, said Schott gave a bond in the penal sum of \$31,047.18. On the request of said Schott said bond was executed by the defendant Illinois Surety Company, hereinafter for brevity referred to as the "Surety Company," as surety, and was in words and figures as follows, to-wit.—

"Know All Men By These Presents, That we, W. H. Schott, principal, and the Illinois Surety Company, a corporation created and existing under the laws of the State of Illinois, as surety, are held and firmly bound unto the United States of America, in the penal sum of Thirty One Thousand, Forty Seven Dollars & 18/100 (\$31,047.18) Dollars, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, assigns, and representatives, jointly and severally by these presents.

"Signed, sealed with our seals, and dated this 3rd day of August, A. D. 1908.

Conditions.

"The condition of the above bond is such, that if the said above-bonded principal, W. H. Schott, his or their heirs, successors, executors, or administrators, shall well and truly, and in a satisfactory manner, fulfill and perform the stipulations of the contract hereto annexed, entered into with the Secretary of the Navy, for and in behalf of the United States, and shall conform in all respects to said contract, as it now exists or may be modified by the parties thereto according to its terms, and to the plans and specifications attached thereto and forming a part thereof, and to the satisfaction of the said Secretary of the Navy and shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract

then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

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W. H. SCHOTT (L. S.)

ILLINOIS SURETY COMPANY (L. S.)

By T. M. BLOUNT (L. S.)

President.

Attest: W. W. WATKINS (L. S.)

Secretary.

(L. S.)

(Illinois Surety Company Seal)

Note:—Words “Chief of the Bureau of Navigation, action under the direction of the,” on the 4th and 5th lines under ‘conditions’ and the words “Chief of the Bureau of Navigation,” on the 8th line, stricken out before signing and words ‘Secretary of the Navy’ inserted on the 8th line.

Signed, Sealed and Delivered

in the presence of—

JNO. D. HIBBARD

H. W. DURHAM

Navy Department,
Office of the Solicitor.

August 5, 1908.

Respectfully submitted with the recommendation that this bond be approved.

PICKENS NEAGLE,
Law Clerk for the Solicitor.

August 5, 1908.

Approved:

J. E. PILLSBURY,

Acting Secretary of the Navy.”

2a. Prior to the entering into of said contract and bond above mentioned Schott, for a number of years, had been engaged as an individual in the general contracting and construction business, with headquarters in the city of Chicago, Illinois, doing business in his own name as “W. H. Schott.” Prior to the making of said contract and bond Schott, in the prosecution of his said business, had become indebted to certain corporations, to-wit:

The American Radiator Company,
The John Davis Company, and the
United States Cast Iron Pipe & Foundry Company,
and some other concerns, in sums aggregating about fifty thousand dollars, and some months prior to the execution

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fact.

of said bond and contract above mentioned these various creditors of Schott formed what was known and called a "Creditors Committee," the members of which were selected from these creditors. It does not appear that the creditors' committee named in the foregoing findings of fact, represented or had authority to represent any of the beneficial plaintiffs and parties in interest in this cause, other than the John Davis Company. The American Radiator Company, the John

Davis Company, and the United States Cast Iron Pipe & Foundry Company, were the largest creditors of Schott and had the largest interest in his affairs. The "Creditors Committee" was composed of five (5) members—only one of which was Henry E. Adams, General Agent of the said American Radiator Company; another was John D. Hibbard, President of the said John Davis Company; another member was A. J. Goodhue, Vice President of the United States Cast Iron Pipe & Foundry Company; and W. A. Brown and John T. Shay representing certain other companies. The reason for the selection of these officers of said companies as members of the committee was, they were the largest creditors of Schott. The committee after its selection controlled Schott's business, with his assistance, in an endeavor to work out a liquidation of his indebtedness.

3. After the making of said contract and bond, above mentioned, Schott entered upon the work provided for by said contract, and continued so to do until January 1, 1909. During the period of time between the execution of the contract and bond and January 1, 1909, the matter of Schott's financial condition and the means of paying his debts was taken up by the said "Creditors Committee" with Schott, and negotiations were entered into between them to develop a plan by which Schott could pay his old debts and get on a sound financial basis for the future. The John Davis Company, through its President, John D. Hibbard, who was a member of the creditors committee, actively participated in these proceedings and negotiations, and was one of the controlling influences therein. In the month of December, 1908, the said Hibbard with the other members of the said creditors committee, after consultation with Schott, determined that Schott should organize a corporation under the laws of the state of Maine with a capital stock of \$1,000,000, and that his business property and contracts should be transferred to such corporation. It was further agreed that the capital stock of \$1,000,000 should be divided into 750 shares of first pr

ferred stock, which was a first lien and claim on all the property, assets and dividends of the corporation; 4250 shares of second preferred, which was a second lien or claim on said property, assets and dividends; and 5000 shares of common stock, which was subject to the claims of the first and second preferred. The first preferred stock, it was agreed, should be sold by Schott to raise new money to put into the corporation; 1000 shares of the second preferred and his common stock was to be delivered to Schott personally, upon the terms mentioned in the contract of assignment hereinafter set forth. About \$36,300 of the first preferred stock was, after the organization, during 1909, sold to outside parties. Thereafter, at the instance of The John Davis Company, The American Radiator Company, and the United States Cast Iron Pipe & Foundry Company, a corporation with the name and style of "The Schott Engineering Company" was duly organized under the laws of the state of Maine, which organization was fully completed on December 28, 1908. Pursuant to an agreement made prior to the organization of the corporation, Messrs. John D. Hibbard, the President of the said John Davis Company, A. J. Goodhue, Vice President of the American Radiator Company, John T. Shay and W. A. Brown, as the representative of other creditors, were duly elected directors of said "The Schott Engineering Company." That none of the directors, except W. H. Schott was financially interested in the Schott Engineering Company, and each of said directors except Schott had and held merely qualifying shares of stock in said Engineering Company, holding their positions as directors for their
540 respective companies. Said John D. Hibbard had no personal interest in said Schott Engineering Company, and was elected a director thereof as representative of the John Davis Company, and qualified and accepted the office of director in said Schott Engineering Company as the authorized representative of the said John Davis Company. The other members of the board who were elected directors, as representatives of creditors, also accepted such positions and acted as such representatives of their companies respectively. John D. Hibbard was fully authorized under the by-laws of the John Davis Company to do all the things that he undertook to, or did, do while acting as director of said Schott Engineering Company.

3a. The Court also finds that all that said John D. Hibbard did, both before and after the organization of said

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Schott Engineering Company, with reference to the affairs of Schott and the Schott Engineering Company, was done as the representative of and for and on behalf of the said John Davis Company, and wherever in these findings the Court refers to the "John Davis Company" it means the John Davis Company, one of the plaintiffs in this suit.

4. The Court further finds that the board of directors of, and the Schott Engineering Company, and its policy and management were, from the time of its organization up to the time it went into bankruptcy, dominated and controlled by the said representatives of the John Davis Company, the American Radiator Company, and the United States Cast Iron Pipe & Foundry Company, and by said Shay and Brown; that the majority of the capital stock was under their control,

and the voting power vested in the creditors committee 541 by means of a voting agreement entered into between Schott and this committee.

4a. Further the Court finds that a meeting of the directors of the Schott Engineering Company was held at the office of the company, in Chicago, Illinois, on January 2, 1909, at which meeting were present the entire board of directors of said company, consisting of seven members, to-wit: said W. H. Schott, A. J. Goodhue, John D. Hibbard, John T. Shay, W. A. Brown, M. O. Payne and Charles R. Schott, the last two of whom were employees of the Engineering Company.

4b. At this meeting said John D. Hibbard was acting as the representative of, and for and on behalf of the John Davis Company and not otherwise. At this meeting a proposal was received in writing from said W. H. Schott, and read to the said Board of Directors in meeting duly assembled, as follows:

Chicago, January 2nd, 1909.

"The Schott Engineering Company,
1108 American Trust Building,
Chicago.

Gentlemen:—

In consideration of your delivery to me, full paid and non-assessable, Seven Hundred Fifty (750) shares par value each \$100.00, of your First Issued Preferred Stock; One Thousand (1,000) shares, par value each \$100.00, of your Preferred stock and Five Thousand (5,000) shares, par value \$100.00 each of your common stock, I propose to assign over to you, the exclusive right, title and ownership of what is known as "The Schott Systems of Central Station Heating,

right, title and ownership to the contract with the Salt Lake Public Service Company, Salt Lake City, Utah; the same with the Des Moines Heating Company, Des Moines, Iowa, the same with the United States Government on the work at Lake Bluff, North Chicago, Illinois, and to further assign the equity in the following list of securities which are now being used as collateral by me on loans with certain individuals, firms and banks:

\$68,500.00 par value of First Mortgage bonds of the Citizens Mutual Heating Co., Terre Haute, Ind.

\$18,500.00 par value of Common stock of the Citizens Mutual Heating Co., Terre Haute, Ind.

\$36,000.00 par value of 5% Preferred stock of the Mt. Carmel Gas & Electric Co., Mt. Carmel, Ill.

\$54,000.00 par value of Common Stock of the Mt. Carmel Gas & Electric Company, Mt. Carmel, Ill.

\$20,750.00 par value of 8% Preferred stock of the Schott Specialty Company, Chicago.

\$58,650.45 par value of Common Stock of the Schott Specialty Company, Chicago.

\$60,926.03 Accounts Receivable.

\$11,800.03 Furniture & Fixtures, Pipe, Fittings, Tools and Implements, Stationery, Scales, etc.

It is further understood and agreed that in consideration of the above delivery, you are to assume a total liability in the way of accounts and Bills Payable on account of construction on hand, etc., in the amount of not to exceed the sum of \$50,000.00.

It is further understood and agreed that the Common Stock is to be delivered to me upon the acceptance of this proposition; that the Preferred Stock is to be delivered to me upon my demand; that the Preferred Stock is to be delivered to me pro rata as I pay in to the Treasury of the Company through myself, successors or assigns, at the rate of seventy-five cents (75c) on the dollar.

I am also to assign to the Corporation my life Insurance policy now with the North Western Life Insurance Co. in the sum of \$50,000.00 this to be transferred so as to be payable to the Company, it being understood that you are to pay all premiums and carry the same.

This proposition is made based on its prompt acceptance and your taking over the business as of January 1st, 1909, and assuming all responsibility and relieving me of any

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liability, excepting the liability incident to the complete performance of the true intent of this proposition.

In reference to any of these contracts where the usual course of assignment might cause any discrepancies, as a matter of convenience to you, it is agreeable for the same to be carried through in my name but all bills are to be paid by you and all receipts are to be delivered to you, so as to give you the benefit, the same as though the accounts were in your name.

Respectfully submitted,

(Signed) W. H. SCHOTT.

4c. Thereupon at said meeting a resolution was adopted that said corporation, the Schott Engineering Company, did then and there accept the said offer of said Schott above set forth, as submitted, to sell, assign and transfer to said corporation, the Schott Engineering Company, the property, assets, contracts, etc., therein described, and that said corporation should issue the capital stock of the corporation in the manner and form as set forth and the amount prescribed. All the directors, to-wit: A. J. Goodhue, John T. Shay, John D. Hibbard, W. A. Brown, M. O. Payne and Charles R. Schott (except Schott himself, who did not vote) voted in favor of the adoption of the resolution accepting said offer of Schott, and the same was declared unanimously carried; whereupon an agreement existed in the terms of said proposal.

The agreement above set forth so entered into by Schott on January 2, 1909, with the Schott Engineering Company, is hereinafter referred to as the "assignment contract."

4d. The Court finds that the contract mentioned in said assignment contract as the contract "with the United States Government on the work at Lake Bluff, North Chicago, Illinois," is the same contract mentioned and described in the declaration filed in this cause, entered into between Schott and the United States Government on July 30, 1908, and the performance of which the bond sued on was given to secure.

5. The Court further finds that after the assignment contract was entered into, and on January 2, 1909, the Schott Engineering Company took full charge of the work of performing the contract with the Government entered into on July 30, 1908, as aforesaid; that said Schott Engineering Company, up to the time it was thrown into bankruptcy, did all of the work on said job and everything in connection with

same; that Schott was elected president of the Schott Engineering Company at said meeting of the board of directors of said company on January 2, 1909, and from that date nothing on his own account with reference to said contract of July 30, 1908, with the Government, or in the performance thereof; that all that he, Schott, did, after said assignment contract was made, was done for and on account of Schott Engineering Company, as its president, and that nothing was done on his personal account or behalf; that he did nothing in regard to the said contract of July 30, 1908, the business transferred to the Schott Engineering Company, without the knowledge and consent of the dominating members of the board of directors, who were the creditors committee.

4a. The Court further finds that said assignment contract was fully consummated, and that Schott did transfer and convey to the Schott Engineering Company the property and assets mentioned in said assignment contract, including his life insurance policy, and that said assignment contract included all of Schott's business, assets and property.

4b. The Court further finds that all of the checks covering remittances from the United States Government under the contract involved in this suit were on the receipt of the same cashed or endorsed over by Schott to the Schott Engineering Company, pursuant to the terms of the assignment contract, and that said Schott Engineering Company received to its own use the proceeds of all such remittances from the Government.

4c. The Court further finds that the Schott Engineering Company became and was the principal in the contract involved in this case, and that the said John Davis Company, plaintiff in this suit, participated in and was one of the controlling factors in bringing about the substitution of the Schott Engineering Company as principal in the place of Schott, individually, in said contract, and that it, the said John Davis Company, voted for the adoption of said assignment contract, and agreed thereto, at the said meeting held on January 2, 1909, through the action of its president, John D. Hubbard.

4d. The Court further finds that the defendant, Illinois Surety Company, never consented to the assignment of the contract involved in this suit, and had no knowledge of said assignment, nor of any of the proceedings or negotiations concerning the same, until after the Schott Engineering Company went into bankruptcy, on or about the 14th day of January,

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1910. The Court finds that said Surety Company was not consulted with reference to said assignment at any time, and as soon as said Surety Company learned of the same it 546 in January, 1910, denied any responsibility for or connection with the Schott Engineering Company.

7. The Court further finds that the Schott Engineering Company took charge of the work under the contract in question at the Naval Training Station on January 2, 1909, and did a large portion of the work, and continued on the job, and taking and appropriating to its own use the moneys derived therefrom, until it was thrown into bankruptcy by bankruptcy proceedings instituted on January 14, 1910, in the District Court of the United States for the Northern District of Illinois, Eastern Division; that on said date the Central Trust Company of Illinois, a corporation, was by said court duly appointed receiver of said Schott Engineering Company, and later on was duly elected trustee thereof; that said Central Trust Company, as such receiver of the Schott Engineering Company, filed its petition in said court in January, 1910, asking said court for instructions as to whether it should proceed to complete the said contract for the work at the Naval Training Station with the United States Government; that at the suggestion of the judge of said court the said receiver on February 1, 1910, sent by mail a circular letter to all creditors of said company of which it had knowledge, which letter is as follows:

"To the creditors of the Estate of

The Schott Engineering Company:

The Central Trust Company of Illinois was appointed receiver of The Schott Engineering Company on January 14 of this year. As you well know, the chief assets of this Company consisted of contracts in the course of completion with various persons and corporations for lighting, heating and power systems. In order to secure to the creditors the benefit

547 fit of any profit there may be in these contracts, the receiver was authorized to continue the business of The

Schott Engineering Company sufficiently long to make such investigation of the various contracts so it could intelligently report to the Court on the question of whether or not it will be to the best interests of the creditors of the estate to continue with any or all of them. Such investigation has been made as to some and is being made as to others.

At the time this receiver was appointed, The Schott Engineering Company was at work on a contract made July

1908, by W. H. Schott with the United States Government. In January, 1909, The Schott Engineering Company was organized, and among other contracts assigned to The Schott Engineering Company by W. H. Schott was this contract of July 30th. We are informed that in consideration of the assignment of these contracts, and other assets, turned over to The Schott Engineering Company by W. H. Schott, the said Schott received certain stock in said Company.

In consideration of the work to be performed on this contract made by W. H. Schott on July 30, 1908, with the United States Government, the Government was to pay a sum of about \$124,000. A supplemental agreement between Schott and the United States Government in April, 1909, added the sum of \$2,000 to the contract price, making the total about \$126,000.

All the work done on this contract since January, 1909, was done by The Schott Engineering Company. Payments have been made by the Government of over \$100,000, and while the vouchers have been made payable to W. H. Schott, they have been indorsed over by him to the Engineering Company. There is still due on this contract from the United States Government, the sum of \$26,000. There are debts due and owing for material in connection with said contract of about \$45,000. It will take an additional sum of \$10,000 to complete the work in its entirety. That will leave in claims due against this work, a sum of about \$55,000, and if the work is completed we will be entitled to \$26,000 still in the hands of the Government.

When W. H. Schott made the contract with the Government he gave to it a bond, with the Illinois Surety Company as surety, in the sum of \$31,000, to insure the faithful performance on his part of the contract. When the receiver was appointed under the order of Court, it took possession of the property of The Schott Engineering Company at North Chicago (where this work is being carried on) and has continued with the work for three weeks. In the meantime the Admiral has notified the receiver that it must secure the consent of the Illinois Surety Company to continue with the work, The Illinois Surety Company, by its General Counsel, claims that it has nothing in common with The Schott Engineering Company, that their principal is W. H. Schott, individually, but as friends of the court, they have suggested that if the work should be carried on by the receiver to a completion, any and all moneys realized therefrom and paid over to it by the

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Government, should be applied first to the payment of any and all indebtedness due under said contract—, meaning thereby that the creditors who have supplied material on this particular work should be paid out of the proceeds derived from said work, and that only after such debts are paid, can any sum be applied to the benefit of the general creditors.

Mr. Schott, the President of the Engineering Company, has stated to the receiver that he has a good claim against the Government for extras in the form of material and labor in the sum of about \$40,000. We might say here that the Admiral in charge of the work or the Government has taken issue

with Mr. Schott on that question, and probably, therefore, 549 if any sum is realized from any claim for extras, it will be after a contest.

This being the condition of affairs, the Central Trust Company of Illinois, through its counsel, prepared a petition setting forth these facts, presented the matter to the Court so as to have the benefit of his instructions, and when the matter came on for hearing, the Court, after being informed of the situation, asked what was the attitude of the creditors with reference to the question involved. Mr. Charles H. Ripley, attorney for the American Radiator Company, was there, representing it and the other creditors who filed the petition in bankruptcy, and he stated to the Court that on behalf of the creditors whom he represented, he thought it to the best interest of the estate that the receiver should continue on with his contract. The Court, then, after taking the advice of all those present, determined to permit the receiver to continue with the work until February 9, 1910, at which time the matter is again to be presented to him, and by which time he has asked that the receiver obtain an expression from the creditors as to their views, as to whether or not the receiver should continue with the work until its completion.

The receiver intends in the meantime also to investigate more in detail the question as to how much money will actually be needed to complete the work. The estimate of \$10,000 was made by Mr. Schott and was concurred in also by the Admiral representing the Government.

If the receiver can do the work for \$10,000 it will be entitled to receive \$26,000 from the Government. The question will then arise whether the \$16,000 that comes into the hands of the receiver over and above the amount necessary to complete this work shall be applied against the debts due on this particular contract, or for the benefit of the gen

550 eral creditors. Necessarily, even if applied to the extinguishment of the debts on this particular work, there will be a reduction of \$16,000 in the amount of the claims filed against the estate.

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The question upon which the Court wishes to have the opinion of the creditors is, if it should decide that the \$16,000 hereinabove mentioned should be applied in payment of the indebtedness due on this particular contract, do the creditors still believe it would be for the best interests of the general creditors that the receiver should be permitted to complete the work?

Should the Receiver not complete the work, the Illinois Surety Company, being on the bond of W. H. Schott, might enter upon the work and complete it. We are informed, however, that that is not their intention.

In that event the Admiral, the representative of the Government, states that new bids would be called for, which would involve additional guaranties by new contractors, all of which would materially, in his opinion, increase the cost, so that possibly the greater part of the \$26,000 would be used by the Government in the finishing and completing of this contract.

As we have stated above, the chief asset of the estate of the Engineering Company is in contracts, and in practically all of those contracts there is a surety, and the position of the Illinois Surety Company in the case of this contract with the Government, is probably the one that will be taken by the other sureties with reference to the contracts in which they are interested.

The receiver for its guidance, in order that it may observe the consensus of opinion of the creditors, and so that it may properly advise the Court, would very much desire an opinion from the creditors as to the policy that should be pursued with reference to these contracts. It will be the aim of the receiver to make an independent investigation on all the contracts which it takes charge of, and will not advise the Court to continue with the work on any unless it believes that a profit will accrue from such action.

We are writing this letter as counsel for the Central Trust Company of Illinois, and ask your reply hereto immediately so that we may present the views of the creditors on these questions to the Court at the next hearing of this matter, which is set for next Tuesday, February 8th.

Very truly yours,

PAM & HURD."

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551 8. The evidence does not show whether this letter was received by all of the plaintiffs in this case. Some of the plaintiffs made no answer to the letter. The details concerning those who did are mentioned in connection with the specific claims hereafter. A large majority of the creditors of the Engineering Company consented to the receiver proceeding with the work, and these replies were laid before the judge of the bankruptcy court, and an order was entered directing the receiver to complete the Naval Training contract on behalf of the Schott Engineering Company; that thereafter said receiver and trustee of said Engineering Company did complete said work, and that said defendant, Surety Company, did not consent thereto.

9. The Court further finds that said Central Trust Company, as trustee for the Schott Engineering Company, collected from the United States Government the final balance that was paid by the Government on the completion of the work.

10. The Court further finds that the Schott Engineering Company was adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois in the month of January, 1910, and that the property and estate of said bankrupt corporation has been and still is in process of administration by said court and the referee in bankruptcy thereof.

11. The Government did not bring suit upon the bond within six months after the completion and final settlement of said contract, and this suit was commenced August 16, 1911; nor did the Government recognize the assignment of the contract from Schott to the Engineering Company, but continued to deal with Schott personally.

552 12. The work was completed by October 1, 1910. The United States Government and Schott made a final settlement of the Government contract, and arrived at the amount due under the contract between February 6, 1911, and February 10, 1911. By the terms of the contract five per cent of the contract price for the work was retained by the United States, and not paid until several months later.

13. All the labor, materials and supplies covered by the claims involved in this suit were furnished for and used in the prosecution of the work covered by said contract entered into between Schott and the United States Government on July 30, 1908.

14. I find that the John Davis Company sold and delivered

ered material to Schott prior to January 2, 1909, the date of the assignment contract, amounting to \$15,125.91; that after January 2, 1909, the John Davis Company delivered and sold material to the Schott Engineering Company amounting to \$6,766.72. The John Davis Company credited upon the entire account with Schott, items totaling \$5,230.93, leaving a balance due of \$16,661.70, which was and is unpaid. The credits of \$5,230.93 applied to the charges of 1908 leave an unpaid balance for 1908 of \$9,893.98. The material sold and delivered by the John Davis Company prior to the date of the assignment contract was sold and delivered to Schott personally, and was charged on the books of the Davis Company to Schott. The material sold and delivered by The John Davis Company, during the year 1909, was charged to Schott upon the books of The John Davis Company. Schott did nothing personally in the execution of the contract after the date of the assignment contract, and anything that he did with reference to the work in question was done as president of the Schott Engineering Company, and for and in its behalf.

14a. As hereinbefore stated, I find that the John Davis Company participated in and shared in bringing about the agreement by which the contract in question was assigned and transferred to the Schott Engineering Company under the terms and stipulations of the assignment contract. The by-laws of the John Davis Company made Hibbard, the president of the company, its chief executive officer, with full authority to make all contracts with reference to the company's business, and to represent it in all of the matters in connection with the negotiations prior to the execution of the assignment contract, and the entering into of the same, and, as hereinbefore stated, that Hibbard had no personal interest in Schott's business or that of the Schott Engineering Company, and everything that he, Hibbard, did with reference to the matters herein referred to was done for and in behalf of the John Davis Company. The Davis Company had full knowledge of the assignment, and that Schott was president of the Engineering Company, and was acting in its behalf, after January 2, 1909.

14b. I further find with reference to the John Davis Company, as above set forth, that it participated in, consented to and helped bring about, the entering into of the assignment contract hereinabove referred to, and in so doing substituted

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a new principal in the contract involved in this case, all of which was done without the knowledge or consent of the defendant, Illinois Surety Company, and without any consultation with it. I further find that the John Davis Company, after the execution of the assignment contract, and long be-

fore this suit was started, and before any controversy
554 arose with reference to the payment for material in-

volved in this claim, the John Davis Company, plaintiff herein, dealt with the Schott Engineering Company as its debtor for the entire amount of the claim of the John Davis Company sued for in this case, and that the Schott Engineering Company and the Davis Company agreed in 1909, and struck a balance, as to the amount that was owing by the Schott Engineering Company to the John Davis Company. The amount as agreed upon included the sum of \$9,893.98, now claimed by the John Davis Company, and also included claims for all materials sold, both before and after the assignment.

14c. December 21, 1909, the Engineering Company received from Schott a check from the Government for \$4,446.92 to apply generally on the work under the Government contract, and sent this check to the John Davis Company, and was by it applied on its claim against Schott, for 1908.

14d. I also find that on February 2, 1910, the John Davis Company received the circular letter hereinabove set forth, which was sent out by the receiver of the Schott Engineering Company on February 1, 1910, addressed to the creditors of the Schott Engineering Company. There is no evidence that the Davis Company made any reply to this letter to the receiver of the Schott Engineering Company. On July 6, 1910, the John Davis Company filed its claim before the referee in bankruptcy in the matter of the Schott Engineering Company, which was as follows:

555

"PROOF OF DEBT DUE CORPORATION.

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IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

In the matter of

Schott Engineering Company, } In Bankruptcy.
Bankrupt. } No. 17328.

United States of America.....
 District of
 State of
 County of } ss.

At Chicago, in said Northern District of Illinois, on the 6th day of July, A. D. 1910, came H. S. Raymond, of Chicago, in the county of Cook and state of Illinois, and made oath and says that he is (1) Acting Treasurer of the John Davis Company, a corporation incorporated by and under the laws of the state of Illinois, and carrying on business at in the county of Cook and state of Illinois, and that he is duly authorized to make this proof, and says that the said Schott Engineering Company, the person (2) against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition, and still is justly and truly indebted to said corporation in the sum of \$30,329.06; that the consideration of said debt is as follows: merchandise sold and delivered to W. H. Schott at his special order and request as shown by statements hereto attached, and partly by promissory notes hereto attached; The Schott Engineering Co. assumed and agreed to pay the liabilities of W. H. Schott for said goods for a valuable consideration, and no part has been paid; that there are no set-offs or counterclaims to the said (4) that said debt (5) due on the 8th day of May, A. D. 1908, hereto attached, marked "Exhibit A" and made a part hereof

That said debt consists of an open account of (6) item maturing at (7) date : that the (8) due date thereof is that no note has been received for such account, nor any

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judgment rendered thereon, and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

H. S. RAYMOND

Acting Treasurer of said Corporation.

Subscribed and sworn to before me, this 6th day of July,
A. D. 1910.

ALBERT N. HOBART

Notary Public

(Official character)"

(Notarial seal)"

This claim so filed in bankruptcy for \$30,329.06 included the full amount of the claim of said John Davis Company, which is sought to be recovered in this suit.

W. H. Schott personally, went into bankruptcy and The John Davis Company also filed a claim against his estate for all of the indebtedness mentioned in its claim against the Schott Engineering Company, a part of which claim, so far as it is material, is as follows: "The consideration of said debt is as follows: Merchandise sold and delivered to said W. H. Schott at his special order and request."

14e. I further find that the John Davis Company consented to and helped to bring about the substitution of a new principal in the contract; that the assignment contract, which was entered into at the instance of said John Davis Company, changed and altered the contract for which the Surety Company gave its bond, and forced a new principal into said contract without the consent of the said Surety Company.

15. With reference to the claim of the Universal Portland Cement Company, I find that during August, September and November, 1908, the said Universal Portland Cement Company sold to Schott a considerable quantity of cement on account, of which the sum of \$1,000.00 now remains unpaid. All of the cement was delivered to the Naval Training Station before the assignment. The greater part of this cement was used prior to the assignment by Schott on the work provided for by the contract, and the balance was used by the Schott Engineering Company after the assignment, as assignee of Schott, in the performance of the work provided for by said contract of July 30, 1908.

I further find that this company received the letter from the Central Trust Company, as receiver of the Schott Engi-

neering Company, dated February 1, 1910, above referred
557 to. But there is no evidence that it made any reply there-
to.

I further find that on or about the 8th day of July, 1910, the said Universal Portland Cement Company filed with a referee in bankruptcy in the matter of the Schott Engineering Company, Bankrupt, a verified claim covering the amount sought to be recovered in this case, and for the same cement which is sought to be recovered here. The wording of this claim, so far as it is material, was as follows: "The consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special order and request, as shown by statements hereto attached and partly by promissory notes hereto attached. The Schott Engineering Company assumed and agreed to pay the liabilities of W. H. Schott for a valuable consideration." This Company also filed a claim against the estate of Schott, the wording of which, so far as it is material, was as follows: "The consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special instance and request."

16. Between September 15, 1909, and December 30, 1909, F. Bairstow sold to the Engineering Company (for use under the contract above mentioned) certain material amounting to \$1,143.75, upon which \$515.68 was paid, leaving a balance of \$628.07. Bairstow received the receiver's letter, and replied thereto, and sold material to the receiver for this work. After this material was furnished F. Bairstow died, and Emma F. Bairstow, George H. Bairstow and Jessie B. Blackmer were appointed executors of his will, and are now acting as such.

17. M. H. Hussey sold and delivered certain material to the Engineering Company for use under the above contract, amounting to \$92.90, all of which is unpaid. All of this material was sold and delivered after January 2, 1909.

558 18. Sometime during the early Fall of 1908 W. H. Schott entered into a written contract with the Western Roofing and Supply Company, hereinafter called the "Supply Company," by which the latter was to furnish, and the former was to take, all the pipe covering for the work in question. In this written contract a number of feet of the various sizes required was stated. The prices to be paid for this covering were also stated therein. The understanding between the parties to the contract was that Schott would forward orders

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for the material covered by the contract as the work progressed.

The first order which followed was mailed to the Supply Company in the month of August, 1908, and this order was signed by W. H. Schott on an order blank with the name "W. H. Schott" printed at the top of same.

559 The above was the only order that was made by Schott personally. The hot water covering referred to in the above order was shipped in February, 1909, and aggregated the sum of \$979.

The court finds that all the other items of the Supply Company's claim were furnished in the year 1909 after the execution of the assignment contract on written orders of the Schott Engineering Company. After the organization of the corporation all of the orders were made out on printed order blanks which bore the printed name and signature of The Schott Engineering Company. On these blanks the words "The Schott Engineering Company," which followed the words "Please deliver to," were, with the exception of one order, erased by ink lines being drawn through them, and the name of W. H. Schott was written over those erased. These orders were introduced in evidence by the Supply Company in support of its claim.

The following is a sample of the orders that were made by said Schott Engineering Company:

560	The Schott Engineering Company 315 Dearborn street, Chicago.
Chicago,	July 13th, 1909
Messrs.	Requisition No. 4218 Western Roofing & Supply Co.,
Address	
Please	ship to The Schott Eng. Co. W. H. Schott, North Chicago, Ill.
Care	Naval Station.
Via	C. & N. W. Ry.
20#	Pate.
100 yds.	7 oz. canvas for covering fittings
Deliver no	invoices to employees. Mail same to 315 Dear-
born Street,	with Bill Of Lading.
Will not be	responsible for goods delivered without requi-
sition.	
Always put	this requisition number on your invoice.
Will not pay	for boxing, packing or cartage.

Goods not shipped check "O" and ask instructions.
Make no back orders."

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THE SCHOTT ENGINEERING COMPANY
By PAYNE

561 All of the orders were identical in form with this one except as to the dates, number of orders and the materials ordered.

These orders from the Schott Engineering Company cover all the material and supplies involved in the Supply Company's claim, and for which it has not been paid. All of the material and supplies covered by these orders were charged on the books of the Supply Company to the Schott Engineering Company and not to W. H. Schott. Invoices were rendered from time to time as the materials were shipped to the Schott Engineering Company. One of these invoices was in the words and figures as follows:

562 "Form 243C 10M. 10-12.

Private Exchange Harrison 5902. All accounts payable
in Chicago or New York funds.
Western Roofing & Supply Company,
616 Fisher Building.

Order No.	Our No.	Chicago, Ill., 12-28-09
Reg. No. 4732	Charge No. 16178	All remittances
Car No.	Via C. & NW	must be made payable
F. O. B.	Shipped to W. H. Schott	to order
% Naval Station, North Chicago. of the Company		

Sold to

Schott Engineering Company,
Chicago, Ill.

Subject to Sight Draft in 30 Days without Further Notice.
Interest Charged on Past Due Accounts."

100 yds. 7 oz. canvas for pipe covering 14½¢ per yard, \$14.50
Copy Copy Copy Copy

Notice. All contracts are subject to strikes, fires and other contingencies beyond our control.

All claims must be made immediately upon receipt of goods.
Our responsibility ceases after delivery to transportation company; for any losses or breakage your recourse is upon them."

Findings of fact. 563 All of the invoices of materials furnished by the Supply Company after January 1st, 1909 were identically the same as the above sample invoice, excepting the dates and the description of the material furnished and the order number.

The invoice for the first shipment arising out of the first order hereinabove stated amounting to \$979, was made out against W. H. Schott. The amount due for the shipment in February, 1909, on the order of Schott personally amounting to \$979, was paid for by the Schott Engineering Company in the year 1909. On May 24, 1909, the Supply Company wrote to the Schott Engineering Company the following letter:

564 "Western Roofing and Supply Company.
Chicago, May 24, 1909.

W. H. Schott Engineering Co.,
1100 American Trust Bldg., Chicago.

Gentlemen:

We enclose herewith a statement of your account on which you will note we have entered credit for the material returned from ear of February 16th.

We can use the funds to very good advantage, and as this matter has now been entirely adjusted we will thank you to kindly favor us with check in settlement of the February item less credit by return mail, and greatly oblige

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

WCI—O

2-16-5-11—\$2107.99

565 The court further finds that this letter in making reference to "your account" included the said item of \$979 for material ordered by Schott personally, as well as material that was shipped to the Schott Engineering Company on its orders. On June 7, 1909 the Supply Company again wrote to the Schott Engineering Company with reference to the item of \$979, which letter was as follows:

566 "Western Roofing and Supply Company.
Chicago, June 7th, 1909.

The Schott Engineering Co.,
American Trust Bldg., Chicago.

Gentlemen:

As per your request we enclose herewith duplicate invoice covering our charge of February 16th on which we issued

redit as of May 13th. We trust that all of this is correct and that we can now look for check in settlement of the account. We might say that we will authorize the deduction of 2% for cash on invoice of May 11th providing your check reaches us by the 10th.

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Thanking you for past favors, we are

Very respectfully,

WESTERN ROOFING & SUPPLY CO.

W. C. IGNATIUS

Treas. & Asst. Mgr.

WCI—O

67 Again on June 24, 1909 a letter was written by the Supply Company to the Schott Engineering Company, enclosing an invoice addressed to the Schott Engineering Company, in which charges were made for the said item of \$979, and also for other material shipped in 1909 to the Schott Engineering Company, in which invoice all of said items are charged against the said Schott Engineering Company.

The Supply Company received during the year 1909 a number of letters concerning the materials covered by the aforesaid contract, some of the letters being on letter heads bearing the name and signature of the Schott Engineering Company, others being on letter heads bearing the name and signature of W. H. Schott.

In August, 1909, the Schott Engineering Company paid by its check the item of \$979, which covered the only item of material and supplies that was ever ordered by Schott individually. This check also remitted for a number of items that were ordered by and charged to the Schott Engineering Company in May, 1909. This remittance settled and paid for in full the only bill for material and supplies that was ordered by Schott.

The court further finds that the Supply Company received the circular letter that was sent out by the receiver of the Schott Engineering Company on February 1st, 1910, hereinabove set forth, and that on February 8, 1910, the said Supply Company answered the same, advising the completion of the work by the receiver.

The court further finds that said Western Roofing & Supply Company, after February 8, 1910, received orders for materials from the Central Trust Company as receiver and trustee of the Schott Engineering Company, and furnished the same to such receiver and trustee, which were

used in the completion of the work on said contract between Schott and the Government, and that said Supply Company was paid for the same by said receiver and trustee of said Schott Engineering Company.

The court further finds that the goods shipped on the first order have been paid for, and after allowing all just claims and set-offs the balance due the Supply Company, not including interest, is \$4873.41.

The court further finds that during the year 1909 correspondence was had between the Supply Company and the Schott Engineering Company in regard to delay in filling of orders and corrections of invoices, amounts of charges and credits and like matters, from all of which the court finds that said Supply Company dealt only with the Schott Engineering Company in making the sales or deliveries for which claim is made in this suit.

569 19. Charles Daniel, trading as Quaker City Rubber Company, one of the use plaintiffs in the above case, during the months of August, September and October, 1909, sold to Schott Engineering Company, (for use under the above mentioned contract), certain goods and merchandise in the sum of \$630.33 on orders from said Schott Engineering Company. All of said goods and merchandise, except one order thereof amounting to \$34.45, were shipped to "W. H. Schott, North Chicago," by order of the Engineering Company. All of said goods and merchandise were used in the work to be performed under said contract in constructing said naval station.

20. The Standard Underground Cable Company, a corporation, and one of the use plaintiffs, sold and delivered to W. H. Schott in 1908, for use under his contract with the Government, a quantity of electrical cables, in the amount of \$6,713.09, of which amount, after allowing all credits and payments thereon, the balance of \$2,563.16 remained overdue at the time of 570 the commencement of this suit, and no part of the same has been paid. The said materials were used in the prosecution of the work under the Schott contract with the Government.

20a. The Standard Underground Cable Company sold and delivered to the Schott Engineering Company in 1909, for use under the said Schott contract with the Government, certain other electrical cables and materials in the amount of \$187.5

which was over due at the time of the commencement of this suit, and no part of the same has been paid. The said cables and materials were shipped consigned to W. H. Schott at Naval Training Station in accordance with the order of the Schott Engineering Company and were used in the prosecution of the work under the said Schott contract with the Government. When the Cable Company shipped its material in 1909 it had knowledge of the fact of the assignment from Schott to the Schott Engineering Company. The order of the Schott Engineering Company for the material that was sold and delivered in 1909 was an order from said Schott Engineering Company, which was delivered to said Standard Underground Cable Company, through J. R. Wiley, its Western Manager, which order was forwarded to the Home Office of Standard Underground Cable Company at Pittsburg, Pennsylvania, with the following letter from said Wiley:

571

"Standard Underground Cable Co.

Chicago Office Dept.

To General Sales Department.

Chicago, Nov. 18, 1909.

Referring to yours of _____

File No. _____

Subject: Schott Engineering Co.

Chicago, Ill.

1672

Gentlemen:

W. H. Schott

C-5181

We hand you enclosed Chicago Order No. 5181 in the name of the Schott Engineering Co. for quick shipment, as set forth in the order and we give you in explanation the information that this lot of material is required to finish up the Schott job at the Naval Training Station, North Chicago, Ill. You will find attached to our order an explanatory letter from our customer informing us that this little lot of material need not be inspected at your factory in the usual way, but will be required to meet the same requirements and inspection at destination. We are not positive that any detail tests will be made upon the material after it arrives at destination as the chances are as soon as it arrives it will be grabbed and connected up by the contractor.

Referring now to overdue account of W. H. Schott. Mr. Schott tells us that he remitted \$1000 several days ago and he tells us also that he has written you a letter explaining that by the first of the year he will have remitted the balance of the account and inasmuch as the Schott Engineering Co.

assumed all of the business, rights, titles etc. of W. H. Schott, you will note the order comes to us and we have made out our order in the name of the Schott Engineering Co.

We do not hesitate to recommend that you go ahead and bill this little order as promptly as possible and we are quite sure that the account will be fully settled in accordance with Mr. Schott's recent advices to our Treasurer.

The point we want to make in this transaction is that in order to finish up the old job they must have this new material and they must have it just as quickly as it is possible to get it to them.

We imagine that our Treasurer will be somewhat relieved by the recent remittance of \$1000 from Mr. Schott and as already explained we have an idea that the whole account will be eventually settled to your entire satisfaction.

Very respectfully,

STANDARD UNDERGROUND CABLE CO.

Per J. R. WILEY
Western Manager."

W—K

Enc.

572 After the receipt of this letter the electrical cables and material covered by said order in said amount of \$187.54 were shipped by said Cable Company to the Schott Engineering Company. The Cable Company filed its claim in the bankruptcy of the Schott Engineering Company for the total amount of its claim in this case, consisting of the two amounts of \$187.54 and \$2563.16, and also filed its claim in the bankruptcy of W. H. Schott for the amount of its claim for materials sold and delivered in 1908, namely, \$2563.16.

21. The Court finds that in August, 1908, the Racine Stone Company, a corporation, and one of the use plaintiffs, entered into a written contract with W. H. Schott whereby said Stone Company agreed to sell and said Schott agreed to purchase all of the crushed limestone to be used by said Schott for the construction of conduit system under the said contract of said Schott with the Government, at a price agreed to be paid by said Schott to said Stone Company; that pursuant to said contract said Stone Company did furnish such crushed stone to said Schott in 1908 and in 1909, and the price thereof was duly paid and settled from time to time, except that the sum of \$113.28 for stone furnished

573 in November and December 1909 was not paid. The ma-

erial was used in the prosecution of the work under the Schott contract with the Government. No evidence appears in the case to the effect that said Stone Company had actual knowledge of the assignment by said Schott of his contract with the Government to the Schott Engineering Company. For the stone furnished under its said contract with Schott the Stone Company opened up account and charged the same to W. H. Schott upon its books of account, and the charges continued to be entered on said books against the said Schott for the stone furnished after January 1, 1909. The Stone Company received the receiver's letter, but made no reply. It also filed the claim here in question against the Engineering Company in the bankruptcy proceedings.

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fact.

22. In September, 1908, the United States Equipment Company, a corporation, and one of the use plaintiffs, entered into an agreement with W. H. Schott, whereby said Equipment Company was to furnish certain cars, track and equipment for use by said Schott at the Naval Training Station in carrying out his contract with the Government, for a rental of \$42.82 per month, and the expense of loading said plant and freight on same to the Naval Training Station, and also freight for return of same to the Equipment Company, to be paid said Equipment Company by said Schott. Said cars, track and equipment were accordingly furnished in said month of September, 1908, by said Equipment Company to said Schott, and the same were used in the prosecution of the work under Schott's contract with the Government until the end of October, 1909, the use being the hauling of work and materials upon and about the grounds where the said construction work was in progress, same being used by Schott until January, 1909, and thereafter by the Schott Engineering Company, and the said cars, track and equipment were returned to the Equipment Company; the charges for loading and freight on the transportation of said cars, track and equipment to the Naval Training Station were paid, as was also the monthly rental to and including the month of June, 1909; the rentals thereafter in 1909, amounting to \$171.28, and the return freight, \$21.11, paid by the Equipment Company, were not paid to it, and same were overdue prior to the commencement of this suit, and no part thereof has been paid.

23. The Roebling Construction Company, a corporation, and one of the use plaintiffs, in September and later in 1908,

Findings of
fact.

by contract with W. H. Schott, performed work in unloading a concrete mixer, and furnished to Schott, at the Naval Training Station, in the carrying out of his contract with the Government, water for the running and operation of the concrete mixer, and water for the running and operation of a certain steam ditcher. The said machines and water were used in the prosecution of the work under Schott's contract with the Government. The reasonable charge of \$8.00 for the unloading of said machine pursuant to said agreement was made by the Roebling Construction Company to Schott, and the reasonable charge for water for said mixer and the said ditcher in 1908, pursuant to said agreement, was made to Schott in the sum of \$65.55, which made a total of \$73.55 charges against Schott in 1908 by the Roebling Construction Company, which amount was overdue at the time of the commencement of this suit, and no part of the same has been paid.

24. The Roebling Construction Company in 1909 similarly furnished the Schott Engineering Company and charged to it for water in use of and in connection with said mixer the reasonable amount of \$53.04, and furnished use of saw-mill on one occasion, for the reasonable charge of 56 cents, and also sold and delivered to the Schott Engineering Company, for use under the contract of Schott with the Government, gravel in the amount of \$44.55, which was used in the said work, making the total amount furnished the Schott Engineering Company, and used in the prosecution of the work under the Schott contract with the Government, in 1909, \$99.13, which was overdue at the time of the commencement of this suit, and no part of the same has been paid.

25. George B. Carpenter & Company, a corporation, and one of the use plaintiffs, in October, 1909, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, certain packing, in the amount of \$19.55, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The material was used in the prosecution of the work under the Schott contract with the Government.

26. The Commonwealth Edison Company, a corporation, and one of the use plaintiffs, in December, 1909, sold and delivered certain conductors and cables to the Schott Engineering Company, for use under the Schott contract with the Gov-

ernment, in the amount of \$74.04, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were shipped consigned to W. H. Schott, as directed by the order, and were used in the prosecution of the work under the Schott contract with the Government.

Findings of
fact.

27. The Electric Appliance Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in 1909, and prior to January 15, 1910, a quantity of materials for use in the prosecution of the work under the Schott contract with the Government, amounting to the sum of \$565.28, which was overdue at the time of 576 the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the contract with the Government.

28. George Racky, doing business as Racky & Son Iron Works, one of the use plaintiffs, in 1909 sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, a certain lot of bolts and clamps, in the amount of \$389.55, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the contract of Schott with the Government.

29. The Davies Supply Company, a corporation, and one of the use plaintiffs, sold and delivered in September, 1909, to the Schott Engineering Company, for use under the Schott contract with the Government, a quantity of wrought iron pipe, amounting to \$98.68, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the order, and the materials were used in the prosecution of the work under the Schott contract with the Government.

30. Nancy W. Watrous, doing business as G. B. Watrous Sons, one of the use plaintiffs, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, in September, 1909, and thereafter until January 11, 1910, certain materials amounting to \$379.85, which was overdue at the time this suit was brought, and no part of the same has been paid. The said materials were used in the prosecution of the work under the said contract with the Government.

findings of
fact.

31. The Featherstone Foundry & Machine Company, a corporation, and one of the use plaintiffs, in 1909 sold and delivered to the Schott Engineering Company a quantity of iron castings and machine work for use under the contract of Schott with the Government, in the amount of \$1,110.20, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the Schott contract with the Government, and they were shipped from time to time consigned to W. H. Schott at the Naval Training Station, in accordance with orders given.

32. The Raymond Lead Company, a corporation, and one of the use plaintiffs, in November, 1909, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, a quantity of lead tees, in the amount of \$143.50, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The material was used in the prosecution of the work under the Schott contract with the Government. The materials were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the order.

33. The H. Channon Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in 1909, for use under the Schott contract with the Government, certain materials which amounted to the sum of \$30.00, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. In accordance with the order said materials were shipped to W. H. Schott at the Naval Training Station, and the said materials were used in the prosecution of the work under the said contract with the Government.

34. James P. Marsh & Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in October, 1909, for use under the Schott contract with the Government, certain air relief valves, amounting to \$90.00, which was overdue at the time of the commencement of this suit, and no part of the same has been paid; and the materials were used in the prosecution of the work under the said contract with the government.

35. The Scott Valve Company, a corporation, and one of the use plaintiffs, in June, and from time to time thereafter until December, 1909, sold and delivered for use under the contract of Schott with the Government, to the Schott Engineering Company, a quantity of valves, in the amount of

\$65.14, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. These materials were used in the prosecution of the work under the Schott contract with the Government. The materials were shipped from time to time consigned to W. H. Schott at the Naval Training Station, in accordance with the orders of the Schott Engineering Company.

36. The Western Kieley Steam Specialty Company, a corporation, and one of the use plaintiffs, in November, 1909, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, a quantity of Steam traps, in the amount of \$150.00, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the Schott contract with the Government. They were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the order of the Schott Engineering Company.

37. The H. W. Johns-Manville Company, a corporation, and one of the use plaintiffs, in June, and thereafter and until December, 1909, sold and delivered to the Schott Engineering Company, for use under the contract of Schott with the Government, certain quantities of electrical materials, consisting of primary and secondary boxes, etc., in the amount of \$1,147.80, upon which \$466.30 was paid in December, 1909, leaving the balance of \$681.50 overdue and unpaid at the time of the commencement of this suit, and no part of said balance has been paid. The materials were used in the prosecution of the work under the Schott contract with the Government. They were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the orders given by the Schott Engineering Company. The H. W. Johns-Manville Company received the letter sent out by the receiver, and sold material to it for the completion of the work.

38. The Stebbins Hardware Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in 1909, for use under the Schott contract with the Government, materials in the amount of \$171.15, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the contract with the Government.

39. D. E. Garrison, Jr., doing business as D. E. Garrison

findings of
fact.

& Company and the Corrugated Bar Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company for use under the Schott contract with the Government in October 1909, corrugated bars in the amount of \$75.25, which was overdue at the time of the commencement of this suit and no part of the same has been paid. In accordance with the direction of the order the materials were shipped by rail consigned to W. H. Schott at the 580 Naval Train Station, No. Chicago. The materials were used in the prosecution of the work under the contract with the Government.

40. Subsequent to January 2, 1909, and during the year 1909, the plaintiff, James B. Clow & Sons, delivered and sold material amounting to \$2,015.54. All of the materials sold and delivered by James B. Clow & Sons were upon orders received from the Schott Engineering Company, and were charged by James B. Clow & Sons upon its books to the Schott Engineering Company. All of said materials were used in the completion of of the Naval Training Station at North Chicago, Illinois, in connection with which the defendant, William H. Schott, gave the bond upon which suit has herein been brought. Said materials were all furnished by the plaintiff, James B. Clow & Sons, during the year 1909, and the entire amount thereof is unpaid, leaving a balance of \$2,015.54.

41. In regard to the claim of the Moloney Electric Company, I find that this company sold during the year 1909 certain electrical apparatus called "transformers," amounting to \$6611.00 and for which the claim is made in this suit, to the Schott Engineering Company; that it was sold to the Schott Engineering Company on its credit, and that the charges therefor were made by said Moloney Electric Company on its books against the said Schott Engineering Company.

The apparatus furnished as aforesaid were used by the Schott Engineering Company, as assignee of Schott, in the work at the Naval Training Station, provided to be done under the said contract of July 30, 1908.

I further find that the said Moloney Electric Company rendered an invoice on October 6, 1909, to the Schott Engineering Company, in which it was expressly stated that said apparatus was sold to the said Schott Engineering Company; and that thereafter said Moloney Electric Company wrote to the said Schott Engineering Company payment of said account involved in this suit.

Conclusions of Law.

*Conclusions
of law.*

1. The work called for by the contract between Schott and the Government was completely performed about October 1, 1910, and final settlement of said contract was made within the contemplation of the statute involved in this case between February 6th and February 10th, 1911.
2. Illinois Surety Company, one of the defendants herein, is liable in debt upon the bond sued upon for not to exceed \$31,047.18.
3. The assignment by W. H. Schott to the Schott Engineering Company of the contract in question released the surety as to all material sold and delivered by any of the for use plaintiffs after January 2, 1909, except in the case of the Racine Stone Company.
4. The Engineering Company became a principal in the Government contract as to all persons except the Government.
5. The participation of the John Davis Company in the substitution of this new principal does not preclude that company from making a claim against the Illinois Surety Company.
6. No privity of contract existed between the Surety Company and the Engineering Company.
7. The Supply Company ratified and confirmed the assignment of contract.
8. All material sold and delivered by the John Davis Company after January 2, 1909, was sold to the Engineering Company.
9. The acts of the John Davis Company, mentioned in 582 the findings of fact, did not in any manner preclude it from claiming a liability against Schott, or against the Surety Company, either by way of equitable estoppel, ratification or otherwise.
10. The John Davis Company consented to and helped to bring about the substitution of a new principal in the contract; that the assignment contract, which was entered into at the instance of said John Davis Company, changed and altered the contract for which the Surety Company gave its bond, and forced a new principal into said contract without the consent of the said Surety Company.
11. The Western Roofing & Supply Co. had a contract with Schott for future deliveries to him, but never made any such delivery of material, except one which was paid for, the

conclusions
of law.

others having been made to the Engineering Company, and the Surety Company is not liable therefor. Said Supply Company dealt only with the Engineering Company in making the sales or deliveries for which claim is made in this suit.

12. The rentals and freight for machinery furnished by the United States Equipment Company are not labor or materials of such kind and character as to entitle the United States Equipment Company to recover for the same, and the Court therefore holds that the United States Equipment Company is not entitled to recover against the Illinois Surety Company.

13. Illinois Surety Company is liable upon the bond sued upon for all materials delivered to W. H. Schott prior to January 2, 1909, to the persons and in the amounts following, together with interest at five per cent per annum thereon from the date of this suit, August 16, 1911.

583 The John Davis Company.....	\$9,893.98
Universal Portland Cement Company.....	1,000.00
Standard Underground Cable Company...	2,563.16
Racine Stone Company.....	113.28
Roebing Construction Company.....	73.55

14. The Surety Company is liable for interest, as stated in the preceding conclusion, for the reason that the sums of money for which it was liable were definite and certain, although the question of its liability was uncertain.

February 6, 1914.

By the Court,

A. L. SANBORN,

Judge.

propositions of
law, submitted
by the
use plaintiffs.

584 And after the court had made and entered its findings of fact hereinabove set forth, and before the court made and entered its conclusions of law above set forth, counsel for the use plaintiffs submitted the following propositions of law to be held by the court, numbered 1, 2 and 3 respectively, to-wit:

585 Now come the for use plaintiffs, by their respective counsel, and they and each of them ask the court to find and hold the following:

1. That the defendant, Illinois Surety Company is liable for and indebted to the for use plaintiffs, and to each of them, to the extent of the penalty of the bond and interest for all work and material which was furnished for and used in the prosecution of the work covered by the contract between

the United States Government and W. H. Schott, with interest thereon. (Refused)

2. That the alleged assignment from W. H. Schott to Schott Engineering Company did not release the Surety as to any labor and material furnished for and used in the prosecution of the work called for in the contract. (Refused)

3. That nothing which any of the for use plaintiffs did in the premises estopped them from insisting upon the liability of the defendant, Illinois Surety Company, for all labor and material furnished for and used in the prosecution of the work covered by the contract. (Refused)

586 And thereupon the court refused said propositions, and each of the same, and marked the same, and each of them "Refused."

And thereupon counsel for the use plaintiffs, and each of them, excepted to the refusal of the court to hold said propositions of law, and each of the same, so submitted.

And the defendant, the Illinois Surety Company, before the court made and entered its conclusions of law hereinabove set forth, submitted to the court the following propositions of law, and each of them, with respect to the claim of the said use plaintiff, the John Davis Company, numbered 1, 2, 3, 4, 5, 6, 7 and 8 inclusive, and requested the court to hold the same and each of them, which propositions of law the court then and there refused, to-wit:

587 1.

The court holds as a conclusion of law that under the facts found in the foregoing findings of fact the John Davis Company is not entitled to recover any amount whatsoever against the defendant Illinois Surety Company.

588 2.

The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the John Davis Company against the Surety Company must be in favor of the Surety Company.

589 3.

The court holds as a conclusion of law, from the evidence, that the John Davis Company cannot recover against the defendant, Illinois Surety Company.

Propositions of law, submitted by the use plaintiffs

Propositions of law, submitted by Illinois Surety Co. with respect to claim of John Davis Co.

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claim of
John Davis
Co.

590

4.

The court holds as a conclusion of law that the participation of the John Davis Company in the substitution of the Schott Engineering Company as principal in the place and stead of Schott in the said Government contract of July 30, 1908, discharged the Illinois Surety Company of and from any and all liability to said John Davis Company.

591

5.

The acts of the John Davis Company in consenting to and participating in the substitution of the Schott Engineering Company as principal in said Government contract, as found by the court in its findings of facts, preclude the said John Davis Company from making any claim whatsoever against said defendant, Illinois Surety Company.

592

6.

The assignment of W. H. Schott to the Schott Engineering Company of the contract in question released and discharged the defendant, Illinois Surety Company, from any and all liability for materials sold either before or after said assignment, to any of the for use plaintiffs who consented to such assignment or who took any benefit thereunder.

593

7.

The court holds as a conclusion of law that the acts of the John Davis Company in consenting to and participating in the assignment of the contract in question by Schott to the Schott Engineering Company, and its subsequent dealings with the Schott Engineering Company in agreeing to and striking the balance of the account as found by the court, and in filing its claim in bankruptcy as set forth in said findings of fact, discharged the defendant, Illinois Surety Company, from any liability to said John Davis Company.

594

8.

The court holds as a conclusion of law that a change or substitution of principals in a contract of the character of said Government contract of July 30, 1908, is a material alteration or change, which, if done without the consent of the surety, releases and discharges such surety in toto and not in part.

5 And thereupon the Illinois Surety Company, by its counsel, then and there excepted to the action of the court in refusing the said propositions, and each of them. And thereupon the defendant, the Illinois Surety Company, before the court made and entered its conclusions of law hereabove set forth, submitted to the court the following propositions of law, and each of them, with respect to the claim of the said use plaintiff, the Universal Portland Cement Company, numbered, 1, 2, 3, 4 and 5 inclusive, and requested the court to hold the same, and each of them, which propositions of law the court then and there refused, to-wit:

Propositions of law, submitted by Illinois Surety Co. with respect to claim of Universal Portland Cement Co.

96

1.

The court holds as a conclusion of law under the facts found in the foregoing findings of fact that the Universal Portland Cement Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

97

2

The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Universal Portland Cement Company against the Illinois Surety Company must be in favor of the Surety Company.

98

3.

The court holds as a conclusion of law from the evidence that the Universal Portland Cement Company cannot recover against the defendant, Illinois Surety Company.

99

4

The court holds as a conclusion of law that the Universal Portland Cement Company, in filing its claim in bankruptcy against the Schott Engineering Company, as set forth in the findings of fact of the court, is precluded from making any claim against the defendant, Illinois Surety Company.

100

5

The court holds as a conclusion of law that the Universal Portland Cement Company, by filing its claim in bankruptcy

propositions of law, submitted by Illinois Surety Co. with respect to claim of Universal Portland Cement Co.

against the Schott Engineering Company for the amount of its claim sought to be recovered in this case, sought to obtain an advantage and benefit under said assignment contract and thereby ratified the same, and cannot make any claim against the defendant, Illinois Surety Company.

propositions of law, submitted by Illinois Surety Co. with respect to claim of Standard Underground Cable Co.

601 And thereupon the Illinois Surety Company, by its counsel, then and there excepted to the action of the court in refusing the said propositions, and each of them.

And thereupon the defendant, the Illinois Surety Company, before the court made and entered its conclusions of law hereinabove set forth, submitted to the court the following propositions of law, and each of them, with respect to the claim of the said use plaintiff, the Standard Underground Cable Company, numbered 1, 2, 3, 4, 5, 6, 7 and 8 inclusive, and requested the court to hold the same, and each of them, which propositions of law the court then and there refused, to-wit:

602

1.

The court holds as a conclusion of law that under the facts found in the foregoing findings of fact the Standard Underground Cable Company is not entitled to recover any amount whatsoever against the defendant Illinois Surety Company.

603

2.

The Court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Standard Underground Cable Company against the Illinois Surety Company must be in favor of the Surety Company.

604

3.

The Court holds as a conclusion of law from the evidence that the Standard Underground Cable Company cannot recover against the defendant, Illinois Surety Company.

605

4.

The court holds that inasmuch as the Standard Underground Cable Company sold material to the assignee of the contract in question, the Schott Engineering Company, after it had knowledge of said assignment and thereafter filed its

aim in bankruptcy against said Schott Engineering Company for the full amount of its claim made herein, that said Cable Company thereby took a benefit or advantage under said assignment and ratified the same and is now precluded as a matter of law from making any claim against said defendant Surety Company.

Propositions of law, submitted by Illinois Surety Co. with respect to claim of Standard Underground Cable Co.

606

5.

The court holds that the Standard Underground Cable Company had the right to accept or reject the transaction by which the contract in question was assigned by Schott to the Schott Engineering Company, and the court further holds that having elected to take the benefits that it, the said Cable Company derived or anticipated that it would derive from the sale of material to the Schott Engineering Company in 1909 and the completion of the said work by said Engineering Company, said Cable Company became bound by the assignment transaction and cannot avoid its effect or take any position inconsistent therewith; and cannot hold the said defendant Surety Company liable for materials sold either before or after the said assignment.

607

6.

The court holds that inasmuch as the Standard Underground Cable Company took advantage of the assignment contract and sold material to the said assignee therein for said work it thereby ratified the substitution of the new principal in said contract, and by reason thereof the defendant, Illinois Surety Company, was and is discharged from all liability to said Cable Company.

608

7.

The Court holds as a conclusion of law from the evidence that the Standard Underground Cable Company cannot recover against the defendant, Illinois Surety Company.

609

8.

The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Standard Underground Cable Company against the Illinois Surety Company must be in favor of the Surety Company.

propositions of law, submitted by Illinois Surety Co. with respect to claim of Roebling Construction Co.

610 And thereupon the Illinois Surety Company, by its counsel, then and there excepted to the action of the court in refusing the said propositions, and each of them.

And thereupon the defendant, the Illinois Surety Company, before the court made and entered its conclusions of law hereinabove set forth, submitted to the court the following propositions of law, and each of them, with respect to the claim of the said use plaintiff, the Roebling Construction Company, numbered 1 and 2, respectively and requested the court to hold the same, and each of them, which propositions of law the court then and there refused, to-wit:

611

1.

The court holds as a conclusion of law, under the facts found in the foregoing findings of fact, that the Roebling Construction Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

612

2.

The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Roebling Construction Company against the Illinois Surety Company must be in favor of the Surety Company.

propositions of law, submitted by Illinois Surety Co. with respect to claim of Racine Stone Co.

613 And thereupon the Illinois Surety Company, by its counsel, then and there excepted to the action of the court in refusing the said propositions, and each of them.

And thereupon the defendant, the Illinois Surety Company, before the court made and entered its conclusions of law hereinabove set forth, submitted to the court the following propositions of law, and each of them, with respect to the claim of the said use plaintiff, the Racine Stone Company, numbered 1, 2 and 3 inclusive, and requested the court to hold the same, and each of them, which propositions of law the court then and there refused, to-wit:

614

1.

The court holds as a conclusion of law, under the facts found in the foregoing findings of fact, that the Racine Stone

Company is not entitled to recover any amount whatsoever against the defendant, Illinois Surety Company.

Propositions of law, submitted by Illinois Surety Co. with respect to claim of Racine Stone Co.

615 2.

The court holds as a conclusion of law, from the facts found in said findings of fact, that the judgment of the court on the claim of the Racine Stone Company against the Illinois Surety Company must be in favor of the Surety Company.

616 3.

The court holds as a conclusion of law that the Racine Stone Company, in filing its claim in bankruptcy against the Schott Engineering Company, as set forth in the findings of fact of the court, is precluded from making any claim against the defendant, Illinois Surety Company.

617 And thereupon the Illinois Surety Company, by its counsel, then and there excepted to the action of the court in refusing the said propositions, and each of them.

Exceptions of use plaintiff to findings of fact and conclusions of law.

Thereupon the court, after refusing the propositions and conclusions of law submitted as aforesaid by the use plaintiffs and the defendant, Illinois Surety Company, as aforesaid, made and entered its conclusions of law above set forth, numbered respectively 1 to 14 inclusive.

Thereupon counsel for the use plaintiffs then and there made and entered the following exceptions to the findings of fact and conclusions of law of the court hereinabove set forth, to-wit:

618 To the findings of fact and conclusions of law filed herein this 6th day of February, 1914, all of the plaintiffs, and each of them, do duly except as follows:

1. That the court finds that the Schott Engineering Company became and was the principal in the contract involved in this suit between the United States of America and W. H. Schott, as found in Paragraphs 5-(c), 14-(b) and 14-(e), for the following reasons:

- (a) There is no evidence to sustain such finding.
- (b) Such finding is a conclusion of law and not a finding of fact.
- (c) Such finding is contrary to law.

Exceptions of
use plaintiffs
to findings
of fact and
conclusions
of law.

2. That the court failed to find that the defendant, Illinois Surety Company, was liable for and indebted to the plaintiffs, and each of them, to the extent of the penalty of the bond and interest, for all work and material which was furnished for and used in the prosecution of the work covered by the contract between the United States Government and W. H. Schott, with interest thereon.

3. That the court finds in Paragraph 5-(c) that The John Davis Company participated in and was one of the controlling factors in bringing about the substitution of the Schott Engineering Company as principal, in the place of Schott individually, in the contract between the United States and Schott, for the following reasons:

(a) Said finding is a conclusion of law and not a finding of fact.

(b) There is no evidence to support said finding.

4. That the court finds in Paragraph 14-(b) that The John Davis Company substituted a new principal in the contract involved in this case, for the following reasons:

(a) Said finding is a conclusion of law and not a finding of fact.

(b) There is no evidence to support said finding.

5. That the court finds in Paragraph 14-(e) that The John Davis Company consented to and helped to bring about the substitution of a new principal in the contract; that the assignment contract which was entered into at the instance of The John Davis Company changed and altered the contract for which the Surety Company gave its bond, and forced a new principal into said contract without the consent of the Surety Company, for the following reasons:

(a) Said finding is a conclusion of law and not a finding of fact.

(b) There is no evidence to support said finding.

(c) Said finding is contrary to law.

6. That the court finds in Paragraph 18-(a) that the Supply Company dealt only with the Schott Engineering Company in making the sales or deliveries for which claim 620 is made in this suit, for the following reasons:

(a) Said finding is not sustained by the evidence.

(b) Said finding is not a finding of fact but a conclusion of law.

(c) Said finding is contrary to law.

7. That the court holds in the third conclusion of law that

Exceptions of
use plaintiffs
to findings
of fact and
conclusions
of law.

the assignment by W. H. Schott to the Schott Engineering Company of the contract in question released the surety as to all material sold and delivered by any of the for use plaintiffs after January 2, 1909, except in the case of the Racine Stone Company, for the following reasons:

(a) Said conclusion is contrary to law.

(b) It is not supported by the facts as found or by the evidence in the case.

(c) Upon the evidence and the facts found, the surety is liable for all labor and material furnished for and used in the prosecution of the work called for by the contract.

8. That the court holds in the fourth conclusion of law that the Engineering Company became a principal in the Government contract as to all persons except the Government, for the following reasons:

(a) Said conclusion is contrary to law.

(b) Said conclusion is not supported by the evidence or by the facts as found.

(c) Upon the evidence and the facts found, the surety is liable for all labor and material furnished for and used in the prosecution of the work called for by the contract.

621 9. That the court holds in the sixth conclusion of law that no privity of contract existed between the Surety Company and the Engineering Company, for the following reason:

(a) Said finding is contrary to law.

10. That the court holds in the seventh conclusion of law that the Supply Company ratified and confirmed the assignment of the contract, for the following reasons:

(a) The finding is contrary to law.

(b) The finding is not supported by the facts found or the evidence in the case.

(c) The Supply Company never knew of the assignment until after the material in question had all been furnished.

11. That the court holds in the eighth conclusion of law that all materials sold and delivered by The John Davis Company after January 2, 1909, was sold to the Engineering Company, for the following reasons:

(a) Said finding is contrary to law.

(b) Said finding is not supported by the facts as found or by the evidence in the case.

12. That the court holds in the tenth conclusion of law that The John Davis Company consented to and helped to

Exceptions of
cause plaintiffs
to findings
of fact and
conclusions
of law.

bring about the substitution of a new principal in the contract; that the assignment contract which was entered into at the instance of said John Davis Company changed and altered the contract for which the Surety Company gave its bond and forced a new principal into said contract without the consent of the said Surety Company, for the following reasons:

(a) Said holding is contrary to law.
622 (b) Said holding is not supported by the findings of fact or by the evidence in the case.

(c) The Surety is liable for all the labor and material furnished for and used in the prosecution of the work covered by the contract.

13. That the court holds in the eleventh conclusion of law that the Supply Company never made but one delivery to Schott and that the Surety Company is not liable therefor and that said Supply Company dealt only with the Engineering Company in making the sales or deliveries for which claim is made in this suit, for the following reasons:

(a) Said finding is contrary to law.

(b) Said finding is not supported by the facts as found or by the evidence in the case.

(c) Delivery to an assignee, if with the consent and procurement of the assignor, as was the fact in this case, is delivery to the assignor.

(d) Schott and therefore the Surety Company is liable for such deliveries unless the Supply Company agreed to release Schott and look solely to the Engineering Company.

14. That the court holds in the twelfth conclusion of law that the rentals and freight for machinery furnished by the United States Equipment Company are not labor or materials of such kind and character as to entitle the United States Equipment Company to recover for the same and that the Equipment Company is not entitled to recover against the Illinois Surety Company, for the following reasons:

(a) Said holding is contrary to law.

(b) Said holding is not supported by the facts found or by the evidence in the case.

623 14½. That the court fails to find that the defendants in error were severally and jointly liable to the plaintiffs in error pro rata to the extent of the penalty of the bond and interest, in the following amounts set opposite their respective names, and that it did not enter judgment and assess damages

to the amount of the penalty of the bond and interest for said amounts, together with interest thereon from August 16, 1911:

The John Davis Company	\$16,661.70
Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased	628.07
Standard Underground Cable Company.....	2,750.70
George Racky, doing business as Racky & Sons Iron Works	389.55
D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company.....	75.25
United States Equipment Company.....	192.39
The Roebling Construction Company.....	172.68
The Western Kiely Steam Specialty Company.....	150.00
H. W. Johns-Manville Company.....	681.50
Stebbins Hardware Company	171.15
Commonwealth Edison Company	74.04
James B. Clow & Sons	2,015.54
Scott Valve Company	365.14
Electric Appliance Company	565.28
Western Roofing & Supply Company.....	4,873.41
Charles A. Daniel, trading as Quaker City Rubber Company	630.33
Maloney Electric Company.....	6,611.01

Exceptions of use plaintiff to findings of fact and conclusions of law.

624 15. That the court fails to find as a matter of law that the defendant is liable for all of the labor, material and supplies covered by the claims involved in this suit, which were furnished for and used in the prosecution of the work covered by the contract between the United States and Schott, to the extent of the penalty of the bond and interest.

625 Thereupon counsel for the defendant, Illinois Surety Company. Mr. Peffers, made and stated the following exceptions to the conclusions of law of the court numbered 1, 2, 3, 5, 9, 13 and 14, above set forth, on behalf of said Surety Company, which exceptions of said defendant, Illinois Surety Company, as stated, were and are as follows:

Exceptions of Illinois Surety Co. to conclusions of law.

626 No. 1.

As to the court's conclusion numbered 1, the Illinois Surety Company excepts to this conclusion because it ignores the fact that the contract provides that a certain portion of the balance of the final payment should be held for one year

Exceptions of
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conclusions
of law.

from completion of the work, and we contend that there was and could be no final settlement until it was determined how much of this retained amount would be required, if any, to repair or replace defective work.

No. 2.

As to the court's conclusion numbered 2, the Illinois Surety Company excepts to this conclusion on the ground that the defendant Illinois Surety Company is not liable to the use plaintiffs, or either of them, on said debt for \$31047.18, or any other sum, and that the court should so hold.

No. 3.

As to the court's conclusion numbered 3, the Illinois Surety Company excepts to this holding on the ground that the Court should hold that the assignment by W. H. Schott to the Schott Engineering Company of the contract in question released the surety on account of materials sold both before and after the assignment. We except on the further ground that 627 the John Davis Company participated in, and helped bring about, the assignment and expressly consented thereto, and that as to said John Davis Company the surety is discharged as to material sold before January 2, 1909, as well as after that date; further that the John Davis Company dealt with the Engineering Company for the whole amount of its claim and afterwards filed a claim in bankruptcy against the Engineering Company for the full amount of its claim based on said assignment; also that the Standard Underground Cable Company, the Universal Portland Cement Company, the Racine Stone Company and Roebling Construction Company, and each of them, took benefits or advantages under the assignment and cannot recovery against the Surety Company for material sold either before or after the assignment.

We further except on the ground that this holding is contrary to the principles of law relating to sureties.

We further except on the ground that the court, by this conclusion, fails to enforce the rule of law that a change of parties to a contract, as found by the court in its findings of fact, without the consent of the surety, discharges the surety in toto and puts an end to the contract so far as the surety is concerned as to the use plaintiffs, who consented to such change of parties, or who participated therein, or who took benefits or advantages by virtue of such change, or who took

benefits or advantages from or under said new party or assignee.

No. 5.

As to the court's conclusion numbered 5, the Illinois Surety Company excepts to this conclusion on the ground that 628 the Surety Company had the right to select and determine with whom and for whom it would contract and become responsible, and that the surety company could not have another person or corporation thrust upon it, as principal in the contract with the Government, without its consent; further on the ground that the substitution of a new principal in the contract was a material alteration of the contract in question, which discharged the Surety Company from all liability to the John Davis Company; further on the ground that the participation of said John Davis Company in the substitution of said new principal in law does preclude said John Davis Company from making any claim whatever against said Illinois Surety Company; further that this conclusion is contrary to the law governing the rights of the Surety Company.

No. 9.

As to the court's conclusion numbered 9, the Illinois Surety Company excepts to this holding on the ground that the acts of the John Davis Company, as mentioned in the findings of fact, do preclude and bar said John Davis Company from claiming any liability against the defendant, Illinois Surety Company, and that on the findings of fact the court should so hold as a conclusion of law; further that on the facts found by the Court the Court should hold that no recovery whatever can be had by said John Davis Company against the Surety Company, and further that the judgment of the court on the claims of said John Davis Company should be in favor of the said Surety Company; further that this conclusion is con- 629 trary to the principles of law controlling the rights of the Surety Company under the facts found by the court.

No. 13.

As to the court's conclusion numbered 13, the Illinois Surety Company excepts to this conclusion on the ground that the Illinois Surety Company is not liable for any material delivered to W. H. Schott prior to January 2, 1909, to the John Davis Company, the Standard Underground Cable Company,

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conclusions
of law.

Universal Portland Cement Company, Racine Stone Company and Roebling Construction Company, or any or either of said Companies. The conduct and acts of the John Davis Company as shown by the evidence, and also as found by the court in its findings of fact, bar it from any recovery, and the same statement applies to each of the others named,—the Universal Portland Cement Company, the Standard Underground Cable Company, the Racine Stone Company and Roebling Construction Company.

We further except to this finding on the ground that these parties are not entitled to interest; that under the facts of this case and the findings they are not entitled to any allowance for interest. The John Davis Company and the Standard Underground Cable Company particularly are not entitled to interest; they were always claiming more than they were entitled to under any circumstances; in addition none of the parties are entitled to interest because the damages due these use plaintiffs were not so certain or definite that the

Surety Company could, without a verdict or judgment of 630 the court, know how much it was liable for, nor were the sums for which the surety Company was liable, if it was liable at all, definite and certain.

No. 14.

As to the court's conclusion numbered 14, the Illinois Surety Company excepts to this conclusion of law concerning interest on the same grounds stated in reference to conclusion numbered 13.

631 Thereupon the plaintiff and all the use plaintiffs and intervening petitioners except the Racine Stove Company and the Universal Portland Cement Company by their counsel entered a motion to vacate and set aside the findings therein and to grant a new trial. The Court overruled and denied the motion, to which action of the Court the above-named parties then and there duly excepted.

Thereupon the defendant Illinois Surety Company moved to vacate and set aside the finding in favor of the use plaintiffs, the John Davis Company, the Universal Portland Cement Company, the Standard Underground Cable Company, the Roebling Construction Company and Racine Stove Company and each of them, which motion the court overruled, to which the defendant Illinois Surety Company excepted, and said Illinois Surety Company

2 Thereupon on the same day, to-wit: on the 6th day of February, A. D. 1914, the court entered judgment, as follows: Judgment of
Feb. 6, 1914.

3 This cause having come on for trial on the 20th day of May, 1913, before the Honorable Arthur L. Sanborn, one of the Judges of said court, and a jury, upon the issues joined between the said plaintiffs and the said defendants, and after all of the evidence had been introduced, the defendant, Illinois Surety Company, and the defendant Schott, moved the court to direct the jury to find the issues in favor of said defendants, and thereupon all of the plaintiffs moved the court to direct the jury to find the issues in favor of the plaintiffs, whereupon the court discharged the jury, and after argument of counsel, the court, on the 6th day of February, 1914, made and filed special findings of fact and conclusions of law, wherein the court finds that United States of America, for the use of the plaintiffs, The John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and Roebling Construction Company, recover from the defendant, Illinois Surety Company, in debt, the sum of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18) and assesses the plaintiffs' damages for the use of said plaintiffs in the sum of Fifty-four Thousand Three Hundred Thirty-three Dollars and Twenty-four Cents (\$54,333.24), as follows:

For the use of The John Davis Company.....	\$11,118.72
" " " " Universal Portland Cement Company	1,123.83
" " " " Standard Underground Cable Company	2,880.69
" " " " Racine Stone Company.....	127.28
" " " " Roebling Construction Company....	82.72

And wherein the court further finds the issues for the defendant, Illinois Surety Company, with respect to the use of the plaintiffs, James B. Clow & Sons, M. H. Hussey, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Ma-

judgment of
Feb. 6, 1914.

loney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, and Charles A. Daniel, trading as Quaker City Rubber Company;

Therefore, It Is Ordered by the Court that the United States of America, for the use of The John Davis Company, Universal Portland Cement Company, Standard Underground Cable Company, Racine Stone Company and Roebling Construction Company, do have and recover of and from the defendant, Illinois Surety Company, said debt of Thirty-one Thousand

Forty-seven Dollars and Eighteen Cents (\$31,047.18) and 635 said damages of Fifteen Thousand Three Hundred Thirty-three Dollars and Twenty-four Cents (\$15,333.24), as follows:

For the use of	The John Davis Company	.....	\$11,118.72
" " " "	Universal Portland Cement Company		1,123.88
" " " "	Standard Underground Cable Company	.....	2,880.63
" " " "	Racine Stone Company	.....	127.25
" " " "	Roebling Construction Company	...	82.75

together with their costs and charges in this behalf expended and have execution therefor; and,

It Is Further Ordered that upon the payment of said damages with interest thereon and costs of suit, said debt be discharged; and,

It Is Further Ordered that the claims of said James H. Clow & Sons, M. H. Hussey, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, Western Kiely Steam Special Company, H. W. Johns-Manville Company, Davies Supply Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Maloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company, and Charles A. Daniel, trading as Quaker City Rubber Company,

and each of them, be and are hereby dismissed, and as to said
claims defendant, Illinois Surety Company, go hence without
day and that said defendant have and recover its costs
636 and charges in this behalf expended and have execution
therefor.

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And it appearing to the court that the demurrers of the
plaintiffs and intervening petitioners herein taken as plain-
tiffs to the certain pleas of bankruptcy filed herein by defend-
ant, W. H. Schott, October 24, 1911, and July 10, 1912, were
overruled by the court and that all of said plaintiffs elected
to stand by their said demurrers and still do so elect;

Therefore, It Is Ordered by the Court that the defendant,
W. H. Schott, go hence without day and do have and recover
from the said use plaintiffs, and each of them, his costs and
charges in this behalf expended and have execution therefor.

A L SANBORN

Judge

637 Thereupon the defendant, Illinois Surety Company, by
its counsel, did then and there make and enter the follow-
ing exceptions, and each of them, to the judgment of said court
in favor of the said use plaintiffs, the John Davis Company,
the Universal Portland Cement Company, the Standard Un-
derground Cable Company, the Roebling Construction Com-
pany and the Racine Stone Company, and each of the said use
plaintiffs, and respecting the judgment in favor of each of the
same, as follows, to wit:

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judgment.

638 And the defendant, Illinois Surety Company, by its
counsel, did then and there except to the action of the
court in assessing the plaintiff's damages for the use of said
John Davis Company in the amount set forth in said judg-
ment; and did also then and there except to the action of the
court in assessing the plaintiff's damages for the use of the
Universal Portland Cement Company in the amount set forth
in said judgment; and did also then and there except to the
action of the court in assessing the plaintiff's damages for the
use of said Standard Underground Cable Company in the
amount set forth in said judgment; and did also then and
there except to the action of the court in assessing the plain-
tiff's damages for the use of the Roebling Construction Com-
pany in the amount set forth in said judgment; and did also
then and there except to the action of the court in assessing

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the plaintiff's damages for the use of said Racine Stone Company in the amount set forth in said judgment;

And did also then and there except to the action of the court in entering judgment for the use of the John Davis Company for said amount; and did also then and there except to the action of the court in entering judgment for the use of the Universal Portland Cement Company for said amount; and did also then and there except to the action of the court in entering judgment for the use of the Standard Underground Cable Company for said amount; and did also then and there except to the action of the court in entering judgment for the use of the Roebling Construction Company for said amount; and did also then and there except to the action of the court in entering judgment for the use of 639 the Racine Stone Company for said amount;

And did also then and there except to the action of the court in entering said judgment for the use of the said John Davis Company on the ground that said judgment in favor of the said use plaintiff, the John Davis Company, was not supported by the evidence, and did also except to said judgment in favor of said John Davis Company as follows:

2nd: that said judgment in favor of said John Davis Company is not supported by the findings of fact.

3rd: that the findings of fact are insufficient to authorize the court in entering judgment in favor of the said use plaintiff, the John Davis Company.

4th: that under the conclusions of law tendered by the said defendant, Illinois Surety Company, and those found by the court, numbered respectively 4, 6 and 10, the said John Davis Company is not entitled to recover.

5th: that under the findings of fact relating to said John Davis Company the judgment of the court should be in favor of the Illinois Surety Company.

6th: that under the findings of fact the John Davis Company is not entitled to recover against said Surety Company.

7th: And defendant Illinois Surety Company did also except to the entry of said judgment in favor of said John Davis Company on the ground that said judgment is not in conformity with the findings of fact of the court, and are inconsistent with said findings of fact of the court respecting said John Davis Company.

8: And said defendant, Illinois Surety Company, did also then and there except to the entry of judgment in favor of said John Davis Company on the ground that under the facts

found by the court in its said findings of fact said John Davis Company is not entitled to recover.

640 And did also then and there except to the action of the court in entering said judgment for the use of the said Universal Cement Company on the ground that said judgment in favor of the said use plaintiff, the Universal Portland Cement Company, was not supported by the evidence, and did also except to said judgment in favor of said Universal Portland Cement Company as follows:

2nd: that said judgment in favor of said Universal Portland Cement Company is not supported by the findings of fact.

3rd: that the findings of fact are insufficient to authorize the court in entering judgment in favor of the said use plaintiff, the Universal Portland Cement Company.

4th: that under the conclusions of law tendered by the said defendant, Illinois Surety Company, the said Universal Portland Cement Company is not entitled to recover.

5th: that under the findings of fact relating to said Universal Portland Cement Company the judgment of the court should be in favor of the Illinois Surety Company.

6th: that under the findings of fact the Universal Portland Cement Company is not entitled to recover against said Surety Company.

7th: And defendant Illinois Surety Company did also except to the entry of said judgment in favor of said Universal Portland Cement Company on the ground that said judgment is not in conformity with the findings of fact of the court, and are inconsistent with said findings of fact of the court respecting said Universal Portland Cement Company.

8th: And said defendant, Illinois Surety Company, did also then and there except to the entry of judgment in favor of said Universal Portland Cement Company on the ground that under the facts found by the court in its said findings of fact said Universal Portland Cement Company is not entitled to recover.

641 And did also then and there except to the action of the court in entering said judgment for the use of the said Standard Underground Cable Company on the ground that said judgment in favor of the said use plaintiff, the Standard Underground Cable Company, was not supported by the evidence, and did also except to said judgment in favor of said Standard Underground Cable Company as follows:

2nd: that said judgment in favor of said Standard Under-

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ground Cable Company is not supported by the findings of fact.

3rd: that the findings of fact are insufficient to authorize the court in entering judgment in favor of the said use plaintiff, the Standard Underground Cable Company.

4th: that under the conclusions of law tendered by the said defendant, Illinois Surety Company, the said Standard Underground Cable Company is not entitled to recover.

5th: that under the findings of fact relating to said Standard Underground Cable Company the judgment of the court should be in favor of the Illinois Surety Company.

6th: that under the findings of fact the Standard Underground Cable Company is not entitled to recover against said Surety Company.

7th: And defendant Illinois Surety Company did also except to the entry of said judgment in favor of said Standard Underground Cable Company on the ground that said judgment is not in conformity with the findings of fact of the court, and are inconsistent with said findings of fact of the court respecting said Standard Underground Cable Company.

8th: And said defendant, Illinois Surety Company, did also then and there except to the entry of judgment in favor of said Standard Underground Cable Company on the ground that under the facts found by the court in its said findings of fact said Standard Underground Cable Company is not entitled to recover.

642 And did also then and there except to the action of the court in entering said judgment for the use of the said Roebling Construction Company on the ground that said judgment in favor of the said use plaintiff, the Roebling Construction Company, was not supported by the evidence, and did also except to said judgment in favor of said Roebling Construction Company as follows:

2nd: that said judgment in favor of said Roebling Construction Company is not supported by the findings of fact.

3rd: that the findings of fact are insufficient to authorize the court in entering judgment in favor of the said use plaintiff, the Roebling Construction Company.

4th: that under the conclusions of law tendered by the said defendant, Illinois Surety Company, the said Roebling Construction Company is not entitled to recover.

5th: that under the findings of fact relating to said Roebling Construction Company the judgment of the court should be in favor of the Illinois Surety Company.

6th: that under the findings of fact the Roebling Construction Company is not entitled to recover against said Surety Company.

7th: And defendant Illinois Surety Company did also except to the entry of said judgment in favor of said Roebling Construction Company on the ground that said judgment is not in conformity with the findings of fact of the court, and are inconsistent with said findings of fact of the court respecting said Roebling Construction Company.

8th: And said defendant, Illinois Surety Company, did also then and there except to the entry of judgment in favor of said Roebling Construction Company on the ground that under the facts found by the court in its said findings of fact said Roebling Construction Company is not entitled to recover.

643 And did also then and there except to the action of the court in entering said judgment for the use of the said Racine Stone Company on the ground that said judgment in favor of the said use plaintiff, the Racine Stone Company, was not supported by the evidence, and did also except to said judgment in favor of said Racine Stone Company as follows:

2nd: that said judgment in favor of said Racine Stone Company is not supported by the findings of fact.

3rd: that the findings of fact are insufficient to authorize the court in entering judgment in favor of the said use plaintiff, the Racine Stone Company.

4th: that under the conclusions of law tendered by the said defendant, Illinois Surety Company, the said Racine Stone Company is not entitled to recover.

5th: that under the findings of fact relating to said Racine Stone Company the judgment of the court should be in favor of the Illinois Surety Company.

6th: that under the findings of fact the Racine Stone Company is not entitled to recover against said Surety Company.

7th: And defendant Illinois Surety Company did also except to the entry of said judgment in favor of said Racine Stone Company on the ground that said judgment is not in conformity with the findings of fact of the court, and are inconsistent with said findings of fact of the court respecting said Racine Stone Company.

8th: And said defendant, Illinois Surety Company, did also then and there except to the entry of judgment in favor of said Racine Stone Company on the ground that under the

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facts found by the court in its said findings of fact said Racine Stone Company is not entitled to recover.

644 To the entry of which judgment all of the plaintiffs and intervening petitions except the Universal Portland Cement Company and Racine Stone Company, except for the following reasons:

1. The matters set up in the pleas of W. H. Schott filed October 24, 1911, and additional plea No. 9 filed July 10, 1912 and his discharge in bankruptcy do not constitute a defense to this action.

2. The judgment should find that Illinois Surety Company and W. H. Schott are liable for and indebted to the for use plaintiffs and intervening petitioners to the amount of the penalty of the bond and interest for all work and material which was furnished for and used in the prosecution of the work covered by the contract between the United States Government and W. H. Schott, with interest thereon from August 16, 1911, and should assess damages for all of said work and material to the amount of the penalty of the bond and interest.

3. The debt recovered in said judgment should not be discharged except upon the payment of damages and interest thereon to the amount of the penalty of the bond and interest for all work and material which was furnished for and used in the prosecution of the work covered by said contract.

4. Neither of the defendants, Illinois Surety Company nor W. H. Schott should recover their costs and charges as against any of the for use plaintiffs and intervening petitioners.

645 Forasmuch as the matters hereinabove set forth do not fully appear of record, the said use plaintiffs the John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased, Standard Underground Cable Company, George Racky, D. E. Garrison, United States Equipment Company, The Roebling Construction Company, The Western Kieley Steam Specialty Company, H. V. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Son, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Racine Stone Company, Charles A. Daniel, Nancy M. Watrous, and Moloney Electric Company, tender this Bill of Exceptions, and the said defendant Illinois Surety Company, also tenders said Bill of Exception

and the use plaintiffs, and each of them, and the said defendant, Illinois Surety Company, pray that the same may be settled and signed by the Honorable judge of this court as and for the Bill of Exceptions on behalf of said use plaintiffs, and each of them, and said defendant, Illinois Surety Company, pursuant to the Statute in such case made and provided, which is accordingly done this 6th day of February, A. D. 1914, and the same made a part of the record in this cause.

A. L. SANBORN,

(Seal)

Judge.

646 It is stipulated and agreed by and between the said use plaintiffs mentioned in the foregoing Bill of Exceptions, by their respective counsel, and the defendant, Illinois Surety Company, and W. H. Schott, by its counsel, that the above and foregoing shall be signed and filed as and for the Bill of Exceptions on behalf of said parties in said cause.

Stipulation
reference
bill of ex-
ceptions.

HOPKINS, PEFFERS & HOPKINS,
WYETH & SMITH,
GLENNON, CARY, WALKER & HOWE,
HOLT, CUTTING & SIDLEY,
TENNEY, HARDING & SHERMAN,
KNAPP & CAMPBELL,
JARRELL & McNEIL,
ADAMS, BOBB & ADAMS.

211 United States }
of America, } ss.

Citation.

To Illinois Surety Company and W. H. Schott:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, at Chicago, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The United States for the use of The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased, Standard Underground Cable Company, George Racky, doing business as Racky & Sons Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company,

ation.

United States Equipment Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Stebbins Hardware Company, Commonwealth Edison Company, James B. Clow & Sons, Scott Valve Company, Electric Appliance Company, Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company, Nancy W. Watrous, trading as G. B. Watrous Sons, and Moloney Electric Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arthur L. Sanborn, United States District Judge, this 6th day of February, in the year of our Lord One Thousand Nine Hundred and Fourteen.

A. L. SANBORN,
United States District Judge.

WDM N

212 IN THE UNITED STATES CIRCUIT-COURT OF APPEALS,
For the Seventh Circuit.

The United States for the use of The John Davis Company, <i>et al.</i>	}
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
Illinois Surety Company and W. H. Schott,	
<i>Defendants in Error.</i>	}

The defendants in error, Illinois Surety Company and W. H. Schott, by their respective counsel, hereby acknowledge service of the attached citation and the receipt of a copy thereof.

ILLINOIS SURETY COMPANY,
By HOPKINS, PEFFERS & HOPKINS,
Its Attorneys

W. H. SCHOTT,
By JARRELL & McNEIL AND
ADAMS, CREWS, BOBB & MERRITT,
His Attorneys

WDM N

216 United States }
of America: } ss.

Citation, filed
Feb. 6, 191

To The John Davis Company; Emma E. Bairstow, George H. Bairstow, and Jesse B. Blackmer, executors of the will of F. Bairstow, deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; the Roebling Construction Company; the Western Kieley Steam Specialty Company; H. W. Johns-Manville Company; Stebbins Hardware Company; Commonwealth-Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Charles A. Daniel, trading as Quaker City Rubber Company; Nancy M. Watrous, trading as G. B. Watrous Sons; and Moloney Electric Company:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Seventh Circuit, at Chicago, Illinois, within thirty days from date hereof, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, wherein the Illinois Surety Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why judgment rendered as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

217 Witness,—Arthur L. Sanborn, United States District Judge in and for the Northern District of Illinois, Eastern Division, this sixth day of February, in the year of our Lord, One thousand, Nine hundred, fourteen.

J

A. L. SANBORN,
United States District Judge.

tation, filed
Feb. 6, 1914.

The said use plaintiffs hereby accept service of the above citation, this 6th day of February, 1914.

KNAPP & CAMPBELL,
GLENNON, CARY, WALKER & HOWE,
WYETH & SMITH,
TENNEY, HARDING & SHERMAN,
HOLT, CUTTING & SIDLEY,
ARTHUR C. DAVIS,
Attorneys for Said Use Plaintiffs.

(Endorsed) Citation Filed Feb 6 1914 T. C. MacMillan
Clerk.

Certificate of Clerk

561

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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 560, inclusive, contain a true copy of the printed record, printed under my supervision and filed February 27, 1914, on which this cause was argued, heard and determined in the case of

The United States of America, for the use of The John
Davis Co., *et al.*,

vs.

Illinois Surety Company and W. H. Schott.

and

Illinois Surety Company

vs.

The United States of America, for the use of The John
Davis Co. *et al.*

No. 2092 & 2093, October Term, 1914, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-sixth day of August, A. D. 1915.

(Seal)

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*



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562

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Room, in the City of Chicago, in said Seventh Circuit on the seventh day of October 1913, of the October Term, in the year of our Lord, one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-eighth year.

And afterwards, to-wit: On the nineteenth day of February, 1914, in the October term last aforesaid, came the plaintiffs in error, by their counsel Messrs. Wm. D. McKenzie, Ralph E. Church, Newton Wyeth, J. Worth Allen, F. Harold Schmitt, Williard C. McNitt and Edwin C. Crawford, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:—

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2092.

October Term, 1913.

United States of America, for the use of The John Davis Co.

vs.

Illinois Surety Company and W. H. Schott.

The Clerk will enter my appearance as counsel for the plaintiffs in error.

WM. D. MCKENZIE,
RALPH E. CHURCH,
NEWTON WYETH,
J. WORTH ALLEN,
F. HAROLD SCHMITT,
WILLIARD C. MCNITT,
EDWIN C. CRAWFORD.

Endorsed: Filed Feb. 19, 1914. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to-wit: On the nineteenth day of February, 1914, in the October Term last aforesaid, came W. H. Schott, one of the defendants, by his counsel Messrs. Dwight S. Bobb, James T. Jarrell and Oswald L. McNeil, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:—

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2092

October Term, 19.....

United States of America, for the use of the John Davis Company *et al.*

vs.

Illinois Surety Company, and W. H. Schott.

The Clerk will enter our appearance as counsel for W. H. Schott, one of the defendants in the above entitled cause.

DWIGHT S. BOBB of ADAMS,
CREWS, BOBB and WESCOTT,
and

JAMES T. JARRELL and
OSWELL L. MCNEIL of
JARRELL & MCNEIL,

Attys.

Endorsed: Filed Feb. 19, 1914. Edward M. Holloway,
Clerk.

And afterwards, to-wit: On the twenty-sixth day of February, 1914, in the October Term last aforesaid, came the Illinois Surety Company, one of the defendants in error, by its counsel Mr. Albert J. Hopkins and Mr. David J. Peffers, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2092.

October Term, 1913.

United States of America for use of John Davis Company *et al.*

Plaintiffs in error,

vs.

Illinois Surety Company,

Defendant in error.

The Clerk will enter my appearance as counsel for the Illinois Surety Company.

ALBERT J. HOPKINS,
DAVID J. PEFFERS.

Endorsed: Filed Feb. 26, 1914. Edward M. Holloway,
Clerk.

And afterwards, to-wit: On the fourteenth day of April, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

Tuesday, April 14, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. William H. Seaman, Circuit Judge.

Hon. Julian W. Mack, Circuit Judge.

Edward M. Holloway, Clerk.

Luman T. Hoy, Marshal.

UNITED STATES OF AMERICA for use of	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
THE JOHN DAVIS CO. <i>et al.</i>		
<i>vs.</i>		
ILLINOIS SURETY COMPANY <i>et al.</i>		

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 21, 1914.

ILLINOIS SURETY COMPANY,	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
<i>vs.</i>		
UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS CO., <i>et al.</i>		

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 21, 1914.

And afterwards, to-wit: On the twenty-first day of May, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Motion to dismiss as to Charles A. Daniel, which Motion is in the words and figures following, to-wit:—

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1913.

THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> , <i>Plaintiffs in Error.</i>	} No. 2092.
<i>vs.</i>	
ILLINOIS SURETY COMPANY and W. H. SCHOTT, <i>Defendants in Error.</i>	

Now comes Charles A. Daniel, trading as the Quaker City Rubber Company, and says that he was joined in the above writ of error by mistake and that he does not wish to prosecute said writ of error for his benefit further, and he, therefore, moves the court that said writ of error be dismissed as to him said Charles A. Daniel, trading as Quaker City Rubber Company.

KNAPP & CAMPBELL,
WYETH & SMITH,
HOLT, CUTTING & SIDLEY,
GLENNON, CARY, WALKER & HOWE,
Attorneys for Plaintiffs in Error.

Endorsed: Filed May 21, 1914. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to-wit: On the twenty-first day of May, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

Thursday, May 21, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. William H. Seaman, Circuit Judge.

Hon. Julian W. Mack, Circuit Judge.

Edward M. Holloway, Clerk.

Luman T. Hoy, Marshal.

UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS CO. <i>et al.</i>	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
2002 <i>vs.</i> ILLINOIS SURETY COMPANY <i>et al.</i>		

Upon motion of counsel for plaintiffs in error, counsel for defendants in error present and consenting thereto, it is ordered that the writ of error in this cause be, and the same is hereby dismissed as to Charles A. Daniel, trading as the Quaker City Rubber Company.

UNITED STATES OF AMERICA for use of THE JOHN DAVIS CO. <i>et al.</i>	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
2002 <i>vs.</i> ILLINOIS SURETY COMPANY.		

Now this day come the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. William D. McKenzie, counsel for The John Davis Co., et al., Mr. Newton Wyeth, counsel for Standard Underground Cable Co., et al., and by Mr. J. Worth Allen, counsel for Western Roofing & Supply Co., and by Mr. David J. Peffers and Mr. Albert J. Hopkins, counsel for Illinois Surety Company, and the Court having heard the same takes this matter under advisement.

ILLINOIS SURETY COMPANY, <i>vs.</i>	}	Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.
UNITED STATES OF AMERICA for the Use of THE JOHN DAVIS COMPANY.		

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Albert J. Hopkins and David J. Peffers, counsel for plaintiff in error; and by Mr. William D. McKenzie, counsel for The John Davis Co., et al.; Mr. Newton Wyeth, counsel for Standard Underground Cable Co., and Mr. J. Worth Allen, counsel for Western Roofing & Supply Co., defendants in error; and the court having heard the same takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the sixth day of October, 1914, of the October Term, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty ninth year.

And afterwards, to-wit: On the fifth day of January, 1915 in the October Term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court in the words and figures following, to-wit:—

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

October Term, 1913.

No. 2092.

April Session, 1914

THE UNITED STATES OF AMERICA for
the Use of THE JOHN DAVIS COMPANY
et al.

Plaintiffs in Error.

vs.

ILLINOIS SURETY COMPANY and W. H.
SCHOTT.

Defendants in Error.

Error to the District Court
of the United States for the
Northern District of Illinois
Eastern Division.

No. 2093.

ILLINOIS SURETY COMPANY,
Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA for
the Use of THE JOHN DAVIS COMPANY
et al.

Defendants in Error.

Error to the District Court
of the United States for the
Northern District of Illinois
Eastern Division.

Before Baker, Seaman and Mack, Circuit Judges.

Mack, Circuit Judge.

On July 30, 1908, William H. Schott entered into a contract with the United States for a certain part of the work involved in the erection of the Naval Training Station at North Chicago. He gave bond, dated August 3, 1908, with the Illinois Surety Company as surety in the penal sum of \$31,047.10 conditioned in accordance with the provisions of "An act for the protection of persons furnishing materials and labor for

the construction of public works" as amended Feb. 24, 1905 (33 Stat. 811), both on his performance of the contract and the prompt payment by him "to all persons supplying him labor and materials in the prosecution of the work provided for in the aforesaid contract."

Prior to Jan. 2, 1909, much work was done under the contract, for which considerable sums were owing by Schott. On that day, under the advice of a creditors' committee which had been assisting him even before July 30, 1908, Schott transferred his entire business to a newly formed corporation, the Schott Engineering Company, which assumed \$50,000 of his indebtedness, agreed to carry out the contracts and gave him its common stock and part of the preferred stock. The balance of the preferred stock was reserved for sale. The president of the John Davis Company, a creditor of Schott, was particularly active in bringing about the assignment and became one of the directors of the company. Schott continued as president to manage the affairs of the company, including the performance of the Government contract, subject, however, to the control of a creditors' board of directors. In January, 1910, the company became bankrupt and the receiver, which had sought the advice of creditors on the question of fulfilling the contract but had secured the consent of only a few of them, continued the work under authority of the court, completing it in October, 1910. Schott became a bankrupt in March, 1910 and received his discharge therein in October, 1910.

The Surety Company knew nothing of the assignment of the contract or of the Engineering Company until the bankruptcy proceedings were begun. The United States never assented to the assignment of the contract but continued to make all of its payments to and to deal directly with Schott alone. The moneys received from it were, however, paid by Schott to the Engineering Company. The accounts between the United States and Schott were finally adjusted between February 6th and 10th, 1911, five per cent. of the contract price being retained by the Government pursuant to the contract which contained, among others, the following provisions:

"Ten per cent. of the amount of each monthly estimate will be withheld until the completion and acceptance of the work. One-half the amount of the reservations thus withheld will then be paid upon public bills certified and approved as above, the remaining one-half of said reservations to be so paid at the expiration of one year from the time of the completion

and acceptance of the work, subject, however, to the provisions of paragraph 56 of these specifications. * * *

"The contractor shall guarantee all work and materials and keep same in perfect repair and condition for a period of one year after the completion and acceptance, unless hereinafter, or in the contract, otherwise stipulated. * * *

"56. Reservation.—One-half of the 10 per cent. reservation hereinbefore provided to be made on all payments will be held for a period of one year after the completion and acceptance of the work. And the contractor agrees that should he fail to make necessary repairs the same may be done by the Government at his expense."

Under the act of 1905, laborers and material men are given a right of action on the bond in the name of the United States "in the Circuit (now District) Court of the United States in the district in which the contract was to be performed * * * and not elsewhere * * * if no suit should be brought by the United States within six months from the completion and final settlement of said contract, * * * Provided, that (such) suit * * * shall not be commenced until after the complete performance of said contract and final settlement thereof."

No suit having been brought by the United States, action was begun in its name for the use of a number of material men and others who might join, on August 16, 1911, more than six months after the adjustment of the accounts but during the year for the retention of the 5% by the Government.

Demurrers to certain pleas of the Surety Company were sustained on the ground that all defenses could be made under other pleas. Each of the parties having requested direction of a verdict in its favor at the close of the evidence, the Court made special findings of fact and conclusions of law, refused some propositions offered by each of the parties and entered judgment in favor of Schott on his special plea of discharge in bankruptcy, and in favor of the Surety Company against all but five of the claimants. As to these five, judgment was rendered in their favor and against the Surety Company for the balance due for materials furnished to Schott prior to Jan. 2, 1909, with interest thereon at 5% from the commencement of the suit, but not for those furnished thereafter either to Schott or to the Engineering Company except in the case of one claimant which, unlike the others, had no knowledge of the assignment at the time the goods were supplied. The claims of those who supplied materials only after Jan. 2, 1909 or who had been paid in full for all goods theretofore fur-

nished, were denied, regardless of whether such goods were consigned to Schott or to the Engineering Company.

The claim of the United States Equipment Company for rental at \$42.82 per month after June, 1909 and for return freight paid by it in October 1909, in accordance with its contract with Schott for the use of cars, track and equipment at the station and for the expense of loading and the freight thereon to and from the station from Sept. 1, 1908 to the end of October 1909, was denied on the ground that this use, for the hauling of work and materials upon and about the grounds, was not labor or materials of such kind or character as to entitle it to recover.

The total claims were in excess of \$38,000; the judgments totalled something over \$15,000. The aggregate of the claims without interest exceeded the penalty of the bond with interest thereon from the commencement of the suit; that of the claims allowed with such interest was less than the penal sum.

In case No. 2092, all but eight of the parties whose claims were denied in whole or in part seek a reversal as against both Schott and the Surety Company.

In case No. 2093, the Surety Company seeks a reversal of the judgments rendered against it in favor of the five claimants.

1. The main question to be determined is the effect of the assignment of the contract by Schott. The Surety Company contends that, as respects the claimants, it amounted to a substitution of a new principal in the contract, a principal for whose defaults it had assumed no responsibility; that this was such a material variation of the obligation guaranteed by it as to discharge it, though a corporation engaged for compensation in the surety business, from any liability on the bond either for goods theretofore supplied to Schott or for those subsequently furnished to the assignee and used in the work.

The claimants maintain that the statute and the bond executed in accordance therewith, aim to protect all those who furnish labor or material for the work covered by the contract specified in the bond; that the obligation guaranteed by the Surety Company is not Schott's contractual debt for goods bought by him for the work but his obligation as principal in the statutory bond to pay for all goods furnished for the work pursuant to his contract with the Government, whether bought by him, his assignee or subcontractor; that

as the Government never sanctioned the assignment but continued to deal with and make payments to Schott alone, the original contract, by virtue of R. S. sec. 3737, remained in full force and effect so that there could have been no change of principals in the only contract pursuant to which all labor and material were supplied.

The statute and bond, literally construed, would seem to afford protection only to those supplying the principal therein, the original contractor; interpreted, however, in the light of the spirit and the purpose of the statute, it clearly aims to give a substitute for the ordinary mechanic's liens to all who furnish labor or material in the prosecution of the public work involved in the contract and pursuant thereto, whether their contractual relations are with the original contractor, or a subcontractor or one in a position analogous to that of a subcontractor. On the other hand, it does not protect one who by agreement or assignment endeavors to put himself practically in the place of the contractor, either by assuming the latter's obligations under the contract or by agreeing to finance the work. This distinction is clearly brought out in the cases of *Hardaway v. Surety Co.*, 211 U. S. 552 on the one hand and *Hill v. Surety Co.*, 200 U. S. 197 and *Mankin v. Ludovici-Celadon Co.*, 215 U. S. 533 on the other.

In the *Hardaway* case, A, B and C, doing business under the firm name of A & B, made a contract with the Government for public work. Two years later, the firm agreed with C that he should pay the firm debts, make all future purchases in his own name and receive all profits from the contracts. C did the work but the Government checks continued to be payable to the firm. Two years thereafter, C entered into a contract with D and E which, after reciting C's financial inability to complete the work, provided that D and E should superintend its completion, finance it, and receive as compensation 15% of the total cost of completion, out of the reserve funds held and the payments to be made by the Government. The court held that D and E were not subcontractors but financiers; they were to furnish the funds for the work and to superintend it; and as the agreement specified the fund out of which they were to be paid, they had no other claim against C and could have none against the Surety Company for materials supplied by them for the work. In the Circuit Court of Appeals, (150 Fed. 465), Judge Lurton, while holding that D and E as mere lenders could not recover, stated that any person supplying labor or material either to C or

o D and E could claim under the bond. This was clearly in accordance with the principle of the Hill case in which the Supreme Court, reversing the lower court, had upheld the claims of material men under subcontractors, in a suit on the bond; and of the Mankin case, in which similar claims were again sustained, notwithstanding the fact that the original contractor had paid the subcontractor in full.

If, in the instant case, the Engineering Company were the claimant, the Hardaway case would be in point. Here, however, as in the Hill case, the claimants have supplied materials for the work pursuant to the contract, whether they furnished them before or after the assignment. In our judgment, there is no substantial difference in the legal relation and therefore none in the rights of materialmen dealing with a subcontractor and those dealing with an assignee, if the assignment has not been sanctioned by the Government. From the standpoint of the materialmen, such an assignment is, in effect, but a subletting; the original contract remains in full force; the original contractor is still responsible for the undertaking.

It follows, therefore, that all of the claimants who supplied material or labor for the work covered by the contract, either to the original contractor or to the assignee and whether with or without knowledge of the assignment, were entitled to the full benefit of the bond, the statutory substitute for a lien, unless, by some act of his own, one or the other claimant may have released or waived or may be estopped from asserting his right.

2. On behalf of the Surety Company, it is urged that the bond must be dealt with as if several bonds had been given, one to the Government and one to each claimant for the sole protection of the obligee; that in this aspect, the assignment, even though invalid as to the United States, and the assent thereto by a claimant evidenced by accepting payment from the assignee on account of the entire claim or by filing the entire claim against the assignee's estate in bankruptcy, make such a material change in the obligation guaranteed to such claimant as will release the surety from any liability to him.

While the argument as to the dual character of the bond is clearly sound, *Equitable Surety Co. v. McMillan*, 234 U. S. 448, 456, the conclusion sought to be drawn therefrom does not follow. The obligation guaranteed by the bond is not, as the contention implies, that Schott as purchaser will pay

for goods sold to him by each of the assumed obligees but that he as the contractor (and as long as the assignment is not recognized by the Government, the only contractor), will pay for all goods furnished by the obligee pursuant to the only contract mentioned in the bond, that between Schott and the United States, regardless of whether Schott or his assignee carrying on the work in Schott's name or a subcontractor is primarily liable therefor as the actual purchaser thereof.

As a materialman's assent to the assignment could not vary this obligation, the principle contended for is entirely inapplicable.

3. A claimant could release or waive his rights under the bond in whole or in part but as a mere assent to the assignment and to the assumption by the assignee of the assignor's obligations, while conferring rights on the claimant as against the assignee, would not amount to a novation (*Ill. Car & Equipment Co. v. Linstroth Wagon Co.*, 112 Fed. 737) or operate to discharge the original debtor from his personal obligation, a fortiori it would not effectuate a release of a lien on property or a discharge of either the principal or surety in the statutory substitute therefor, the bond. It is not contended and, under the findings and the evidence, it could not be successfully urged that any claimant expressly released or waived his claim against Schott or the Surety Company.

4. The finding of the court that the Davis Company consented to and helped to bring about the substitution of a new principal in the contract and that the assignment contract forced a new principal into the contract, while called a finding of fact, is in effect a conclusion of law and one in which we cannot concur, inasmuch as without the Government's consent, no new principal could, as a matter of law, be forced into the only contract in question, that between Schott and the United States.

5. Neither the Davis Company nor any other creditor is estopped from asserting his rights against the Surety Company because, irrespective of all else, an element essential to an estoppel in pais is lacking: damage to the Surety Company. The findings and the evidence demonstrate that the creation of the corporation and the assignment to it of Schott's interests brought fresh capital into the enterprise and delayed the failure; that neither this nor the completion of the work by the Receiver diminished the rights of or damaged the Surety Company; any payments made by and any dividends

obtained from filing claims against the Engineering Company have reduced the liability of Schott and the Surety Company.

6. No question of election of inconsistent rights or remedies is involved. Under the bond, the principal and the surety are liable for labor and material furnished for the work pursuant to the contract; this does not exclude or limit any personal obligation of the contractor or the assignee or both, either directly, as debtor, for goods bought or by reason of the assumption of any such debt; moreover, the creditors far from electing to release Schott, very properly filed their claims against his estate in bankruptcy as well as against that of his assignee. They thereby asserted their intention to hold each of them, not their election to accept the assignee as their sole debtor. *Anglo American Land M & A Co. v. Lombard*, 132 Fed. 721.

7. Inasmuch as all defenses were properly permitted to be made under the three pleas, there was no error in sustaining the demurrers to the special pleas other than that of Schott's discharge in bankruptcy.

8. One of these defenses involved the question whether there was "complete performance and final settlement of the contract" within the meaning of the statute, on or before Feb. 11, 1909, or whether the guaranty and obligation to keep in repair during the year that the Government retained the 5%, postponed either the completion or the settlement for a year. In the latter event, an action brought in August, 1911 could not be maintained.

We agree with the views expressed by the trial judge on both points, 195 Fed. 306. The statutory phrase "settlement thereof" does not mean "payment therefor." When a final accounting was had between Schott and the Government, the contract was finally settled even though payment of part of the balance found due on the accounting was to be withheld for a year as security for a guaranty of the work and the covenant to keep it in repair during that period. *Ill. Surety Co. v. U. S.*, 215 Fed. 384.

Obviously, too, such a guaranty and covenant does not prevent complete performance of the work itself.

Under a literal construction of the act, action on the bond would be postponed until every collateral guaranty and covenant to repair contained in the contract had expired by limitation, whether it be in one or in many years. In our judgment, however, the true intent and purpose of the statute are

to give legal redress after the public work itself shall have been completed and accounts therefor adjusted.

9. Inasmuch as the principal of the claims to be allowed is in excess of the penalty on the bond with the interest thereon, it is immaterial whether or not interest at 5% is allowed on each claim. We agree, however, with the ruling of the trial court that, as the amount of the claims was liquidated and undisputed, the controversy being confined to the question of liability for the whole or a definite part thereof, interest was properly allowed from the commencement of the suit.

10. The principal of the bond, however, is not the measure of liability thereon; failure of the surety to discharge its obligation thereunder after proper demand or commencement of suit subjects it to the payment of interest. Under Illinois Revised Statutes, Ch. 74, Sec. 2, as construed in *Holmes v. Standard Oil Co.*, 183 Ill. 70, this is at the rate of five per cent. per annum from the commencement of the suit.

11. The claim of the United States Equipment Co. should be allowed. The statute is broader than many of the mechanic's lien acts; it covers not only labor and material that go directly into the completed structure but all labor and material furnished "in the prosecution of the work provided for in such contract." The work performed by this claimant through the use of its equipment was well within the statutory provision. *Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717; *Surety Co. v. Byrant*, 147 Fed. 155.

12. If this were an ordinary surety bond conditioned on prompt payment for goods supplied to a contractor there would be no doubt of the provability of and Schott's consequent discharge from claims thereunder. The condition clearly was broken before Schott's bankruptcy; the claims were then "a fixed liability evidenced by an instrument in writing, absolutely owing" within Sec. 63, subsec. 1, of the Bankruptcy Act.

The statutory provision for only one suit and that in the District Court of the district in which the work is done and the further provision that no suit shall be brought by a claimant until six months after completion of the work and final settlement and then only if the United States failed to sue, do not make the liability itself under the bond any the less absolute after breach of the condition, whatever their effect may be as limitations of the right created by the statute (*Texas Cement Co. v. McCord*, 233 U. S. 157), on the time,

method and forum for determining or liquidating any disputed claim.

Nor does the fact that a claimant may eventually obtain no share in the judgment for the penalty of the bond because of the Government's right to priority, or only a proportionate part thereof less than his claim because of the necessity of sharing pro rata with other claimants, affect the absolute character of the liability.

We agree with the ruling of the trial judge, contrary to that in *re Hawley*, 194 Fed. 751, that Schott's discharge in bankruptcy is a good defense. The judgment in Schott's favor will, therefore, be affirmed with costs as to him in case No. 2092.

As to the Surety Company, the judgment will be reversed at its costs in both proceedings and the cause remanded for retrial.

And afterwards, on the same day, to-wit: On the fifth day of January, 1915, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:—

Tuesday, January 5, 1915.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. William H. Seaman, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.

UNITED STATES OF AMERICA for the use of The John Davis Company, Universal Portland Cement Company, Emma E. Bairstow, George H. Bairstow and Jesse B. Blackmer, Executors of F. Bairstow, deceased, M. H. Hussey, Standard Underground Cable Company, George Racky, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States Equipment Company, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, The Roebling Construction Company, The Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Racine Stone Company, Stebbins Hardware Company, Commonwealth Company, H. Channon Company, Nancy W. Waterous, doing business as G. B. Waterous Sons, James B. Clow & Sons, Scott Valve Company, Featherstone Foundry & Machine Company, Electric Appliances Company, Western Roofing & Supply Company, Charles A. Daniel, Trading as Quaker City Rubber Company and Moloney Electric Company,

2002

vs.

ILLINOIS SURETY COMPANY and W. H. SCHOTT.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court and that the judgment of the said Dis-

trict Court in this cause in W. H. Schott's favor be, and the same is hereby affirmed with costs as to him.

And it is further ordered and adjudged by this Court that the said judgment of the said District Court in this cause, as to the Illinois Surety Company be, and the same is hereby reversed at its costs; and that this cause be, and the same is hereby remanded to the said District Court with the direction to grant a re-trial.

ILLINOIS SURETY COMPANY,

2003

vs.

UNITED STATES OF AMERICA, for the use of John Davis Company, Universal Portland Cement Company; Anna E. Bairstow, George H. Bairstow and Jessie B. Blackmer; Executors of F. Bairstow, Deceased; M. H. Hussey, Standard Underground Cable Company; George Racky; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; James P. Marsh & Company; Raymond Lead Company; George B. Carpenter & Company; Roebling Construction Company; Western Kleley Steam Specialty Company; H. W. Johns-Manville Company; Davies Supply Company; Racine Stone Company; Stebbens Hardware Company; Commonwealth Edison Company; H. Channon Company; Nancy M. Watrous, doing business as G. B. Watrous Sons; James B. Clow & Sons; Scott Valve Company; Featherstone Foundry & Machine Company; Electric Appliance Company; Western Roofing & Supply Company, Charles A. Daniel, trading as Quaker City Rubber Company and Maloney Electric Company.

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause, as to the Illinois Surety Company be, and the same is hereby reversed at its costs; and that this cause be and the same is hereby remanded to the said District Court with the direction to grant a retrial.

And afterwards, to-wit: On the twenty-second day of January, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Motion and Notice, in the words and figures following, to-wit:—

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	} No. 2092.
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
ILLINOIS SURETY COMPANY and W. H. SCHOTT, <i>Defendants in Error.</i>	

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error.</i>	} No. 2093.
<i>vs.</i>	
THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	
<i>Defendants in Error.</i>	

Now come the plaintiffs in the above entitled cause, by their several counsel, and move this Honorable Court to modify its opinion heretofore filed in this cause in so far as such opinion remands the cause for a re-trial, and the plaintiffs further move this Honorable Court either to enter a judgment in this court upon the facts found by the District Court or to direct the District Court to enter a judgment upon the findings in accordance with the opinion of this Court.

Neither in the District Court nor in this court has there been any contested question of fact. The matters passed upon by both courts have been purely questions of law. This court has decided that all of the for use plaintiffs who have joined in the appeal shall recover from the surety upon the bond. The exact amounts of the claims of each of the for use plaintiffs were found by the District Court and such findings appear in the record filed in this Court. This Court, therefore, should enter judgment and thus save the time and expense

which will result from remanding the case either with directions to enter judgment upon the findings or for a re-trial.

Respectfully submitted,

WILLIAM D. MCKENZIE,
RALPH E. CHURCH,
NEWTON WYETH,
CHARLES S. HOLT,
F. HAROLD SCHMITT,
EDWIN C. CRAWFORD,
Counsel for Plaintiffs in Error.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	} No. 2092.
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
ILLINOIS SURETY COMPANY and W. H. SCHOTT,	} No. 2093.
<i>Defendants in Error.</i>	

ILLINOIS SURETY COMPANY,	} No. 2093.
<i>Plaintiff in Error,</i>	
<i>vs.</i>	} No. 2093.
THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	
<i>Defendants in Error.</i>	

To Albert J. Hopkins, David J. Peffers, Dwight S. Bobb,
James T. Jarrell, Oswald J. McNeil, Counsel for Illinois
Surety Company and W. H. Schott:

You Are Hereby Notified that on Friday, the 22nd day of
January, 1915, at 10:00 o'clock in the forenoon, or as soon
thereafter as the matter can be heard, in the court room of
the United States Circuit Court of Appeals in the Federal
Building, Chicago, we shall appear before their Honors, the
Judges of said Court, and file the motion a copy of which is
attached hereto, asking that the opinion heretofore filed in
the above entitled case be modified in so far as it remands the

case for a new trial, and that the court either enter a judgment in this court upon the findings or direct the lower court to enter such judgment.

WILLIAM D. MCKENZIE,
RALPH E. CHURCH,
NEWTON WYETH,
CHARLES S. HOLT,
F. HAROLD SCHMITT,
EDWIN C. CRAWFORD.

Received a copy of the foregoing notice and motion this 20 day of January, 1915.

ALBERT J. HOPKINS
per HOPKINS
DAVID J. PEFFERS
per HOPKINS
DWIGHT S. BOBB
JAMES T. JARRELL
OSWELL L. MCNEIL

Endorsed: Filed Jan. 22, 1915. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to-wit: On the twenty-second day of January, 1915, in the October term last aforesaid, certain Objections to the Motion to Modify the Opinion were filed in the office of the Clerk of this Court, which said Objections are in the words and figures following, to-wit:—

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

THE UNITED STATES OF AMERICA for
the use of THE JOHN DAVIS COMPANY
et al.,
Plaintiffs in Error,
vs.
ILLINOIS SURETY COMPANY and W. H.
SCHOTT,
Defendants in Error.

No. 2092.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA for
the use of THE JOHN DAVIS COMPANY
et al.,
Defendants in Error.

No. 2093.

To Messrs. William D. McKenzie, Ralph E. Church, Newton Wyeth, Charles S. Holt, F. Harold Schmitt, Edwin C. Crawford.

You Are Hereby Notified that on Friday, the 22d. day of January, 1915, at ten o'clock in the forenoon, or as soon thereafter as the matter can be heard, in the Court room of the United States Circuit Court of Appeals in the Federal Building, Chicago, we shall ask leave to enter our appearance as counsel for the Illinois Surety Company, defendant in error, in No. 2092 and plaintiff in error in No. 2093, and shall at the same time file objections and counter suggestions on the motion to modify the opinion heretofore filed, and ask for an opportunity to argue the same orally, at which time and place you can appear and be heard, if you see fit.

JUDAH, WILLARD, WOLF & REICHMANN.

Received a copy of the above notice this 21st day of January, 1915.

WM. D. MCKENZIE
RALPH E. CHURCH
NEWTON WYETH
EDWIN C. CRAWFORD
F. HAROLD SCHMITT
CHARLES S. HOLT

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	} No. 2092.
<i>Plaintiffs in Error,</i>	
<i>vs.</i>	
ILLINOIS SURETY COMPANY and W. H. SCHOTT, <i>Defendants in Error.</i>	

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	} No. 2093.
<i>vs.</i>	
THE UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et al.</i> ,	
<i>Defendants in Error.</i>	

Now comes the Illinois Surety Company, defendant in error in No. 2092 and plaintiff in error in No. 2093, by Judah, Willard, Wolf & Reichmann and Hopkins & Peffers, their counsel, and object to the granting of the motion to modify the opinion heretofore filed in this cause and to enter judgment in this court upon the facts found, or to direct the District Court to enter judgment upon the findings in accordance with the opinion of the District Court for the following reasons:

1. Because the time for filing a petition for rehearing has not yet expired, and the Illinois Surety Company intends and expects to apply to this court to grant a rehearing. This motion is, therefore, premature, and ought not to be disposed of at this time.

2. Such an order ought not to be entered in this cause upon the facts and circumstances, because (1) there are a number of for use plaintiffs who did not join in the writ of error in No. 2092 and who are not before this court, and this court would have no power to enter a judgment in favor of the plaintiffs below who did not join in the writ of error or to modify the judgment of the District Court with respect to the rights and claims of those parties who are not plaintiffs in error; (2) inasmuch as this court has found that claimants who claim the aggregate of an amount in excess of the penalty of the bond are entitled to recover, judgments cannot be entered for the full amount of their claims, but it is necessary to abate their claims proportionately; (3) by analogy to the

law of Mechanic's Liens, the claimants who sold material to the original contractor would be entitled to priority over claimants who sold material to his assignee, so that it would be impossible for this court to direct the judgment which should be entered by the District Court; (4) that the official process on which this action was begun, was by an ordinary summons in an action at law and the filing of an ordinary declaration in an action at law; that the action is brought under the Act of February 24th, 1905, Chapter 778, 32 Statutes at Large, page 811; that that act provides a remedy in equity and not at law and that the issues represented in No. 2092 and No. 2093 are not cognizable in a court of law, and the court below, sitting as a court of law was without jurisdiction of the subject matter and had no power to grant any judgment prayed, and that this court has no power, under the issues presented in the record on #2092 and No. 2093 to grant any relief whatever against the Illinois Surety Company, or to direct the lower court to enter judgment, and that this court is wholly without jurisdiction in the premises. If this court decides to dispose of this motion to modify the opinion at this time we desire an opportunity to be heard orally under the rules in opposition to the motion.

Respectfully Submitted,

JUDAH, WILLARD, WOLF & REICHMANN

HOPKINS & PEFFERS

Attorneys for Illinois Surety Company.

Endorsed: Filed Jan. 22, 1915. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to-wit: On the twenty-second day of January, 1915, in the October Term last aforesaid, came the Illinois Surety Company, by its counsel Messrs. Noble B. Judah, Henry M. Wolf, A. F. Reichmann and Arthur M. Cox, and filed in the office of the Clerk of this Court their appearance, which appearance is in the words and figures following, to-wit:—

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2092.

October Term, 1914.

The United States of America for the Use of The John
Davis Company

*Plaintiffs in Error**vs.*

Illinois Surety Company and W. H. Schott

Defendants in Error.

The Clerk will enter our appearance as associate counsel
for the Illinois Surety Company.

NOBLE B. JUDAH

HENRY M. WOLF

A. F. REICHMANN

ARTHUR M. COX

Endorsed: Filed Jan. 22, 1915. Edward M. Holloway,
Clerk.

And afterwards, to-wit: On the third day of February, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, on the same day, to-wit: On the third day of February, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Proof of Service of Petition for Rehearing, which said Proof of Service is not copied here nor made a part of this record.

And afterwards, to-wit: On the twenty-third day of February, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Answer to Petition for Rehearing, which said Answer is not copied here nor made a part of this record.

And afterwards, to-wit: On the sixth day of August, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court on petition for rehearing and on motion to modify opinion and for entry of final judgment, which said Opinion is in the words and figures following, to-wit:—

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2092-2093.

October Term, 1914.

January Session, 1915.

UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.</i> ,	} No. 2092.
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
ILLINOIS SURETY COMPANY and W. H. SCHOTT, <i>Defendant in Error.</i>	

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	} No. 2093.
<i>vs.</i>	
UNITED STATES OF AMERICA for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.</i> ,	
<i>Defendant in Error.</i>	

On petition for rehearing and on motion to modify opinion and for entry of final judgment.

Before BAKER and MACK, *Circuit Judges.*

MACK, *Circuit Judge:*

The able brief filed on the petition for rehearing presents no matter that was not heretofore fully considered by the Court. The petition will be denied.

The successful parties move that instead of remanding the cause for retrial, this Court enter a judgment or direct the

District Court to enter a judgment on the findings heretofore made therein.

In opposition thereto, it is urged for the first time by what may be deemed a counter motion, that this Court should dismiss the case on the ground that it is a suit at common law and that the issues can be determined only in a court of equity.

Since the briefs on this motion were submitted, the judicial code has been amended by the Act of March 3, 1915; section 274-a has been added thereto. It forms part of chapter eleven, covering "Provisions common to more than one court" and is as follows:

"Sec. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

If this cause of action were cognizable only in a court of equity, no substantial amendment to the pleadings would be necessary to effectuate the change now permitted by the statute and, as the findings of fact are undisputed, it would be the duty of this court to enter or to direct the entry of such a decree as our conclusions of law require. There would be no difference in substance between such a decree in equity and the proper judgment at law and the defendant would have no ground to complain that the enforcement of a judgment might be less efficacious than that of a decree.

But even without the new statute the objection could not prevail, for inasmuch as the court of law clearly was not without jurisdiction of the subject matter, it comes too late. *U. P. R. R. Co. v. Whitney*, 198 Fed., 784, 787; *Reyner v. Dumont*, 130 U. S., 354. Again, as the case was, in effect, tried by the court without a jury, and its findings of fact are not attacked, it is of no practical importance whether a court of law or of equity was the proper form. *Ill Surety Co. v. U. S.*, 215 Fed., 334. The counter motion to dismiss will be denied.

It is, however, urged that, dealing with the case as an action at law, this Court is without power to modify the judgment of the District Court and can only remand with directions to award a new trial. The objection is without merit. This Court is vested with power to modify as well as to affirm or reverse any judgment of the District Court. R. S. sec. 701; Act of March 3, 1891, sec. 11; and, in a case tried without a jury, where the findings of fact made by the court are undisputed, as well as when they are agreed upon by the parties as in *Thomas v Matthiessen*, 232 U. S., 221, the proper judgment may be rendered thereon in the appellate tribunal after a reversal of the judgment of the trial court. See, too, *Ins. Co. v. Boykin*, 12 Wall., 433; *Ins. Co. v. Piaggio*, 16 Wall., 378.

The motion to modify the order heretofore made and to render judgment in accordance with the findings of fact made by the trial judge and the law as held in the opinion heretofore filed, will be granted. The judgment will be in debt for the face of the bond with damages for the same amount, for the use of the plaintiffs in error in case No. 2092. As the total amount due them under the findings exceeds the face of the bond, the damages for the use of each of them will be reduced pro rata and will be for the several amounts as found by the trial court, so reduced. The reduced damages are specified in the judgment order which we direct to be entered, and bear interest at five per cent. per annum from August 16th, 1911.

The judgment of the District Court is reversed and the cause remanded with directions to enter therein the judgment which we have entered here and to enforce said judgment by proper process.

NOTE: Judge Seaman concurred in overruling the petition for rehearing; he did not participate in the consideration of the motion and counter motion.

And afterwards, on the same day, to-wit: On the sixth day of August, 1915, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, August 6, 1915.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.

Hon. Julian W. Mack, Circuit Judge.

Edward M. Holloway, Clerk.

John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.

Hon. Julian W. Mack, Circuit Judge.

THE UNITED STATES OF AMERICA for
the use of THE JOHN DAVIS COMPANY
et al.,

2002

vs.

Plaintiffs in Error,

ILLINOIS SURETY COMPANY and W. H.
SCHOTT,

Defendants in Error.

Error to the District Court
of the United States for the
Northern District of Illinois,
Eastern Division.

ILLINOIS SURETY COMPANY,

Plaintiff in Error,

2003

vs.

THE UNITED STATES OF AMERICA for
the use of THE JOHN DAVIS COMPANY
et al.,

Defendants in Error.

Error to the District Court
of the United States for the
Northern District of Illinois,
Eastern Division.

This cause having come on for hearing upon the opinion of this court filed on the 5th day of January, 1915, and the supplementary opinion filed on the 6th day of August, 1915, upon the special findings of fact made and filed by the District Court of the United States, for the Northern District of Illinois, Eastern Division, upon the record of the trial of said cause in said District Court, upon the briefs filed in this cause, and after argument of counsel, It Is Ordered:

1. That the judgment entered by said District Court be, and the same is hereby reversed.

2. That the United States of America, for the use of The John Davis Company; Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, Deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works;

D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; The Roebling Construction Company; The Western Kiely Steam Specialty Company; H. W. Johns-Manville Company; Stebbins Hardware Company; Commonwealth Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Maloney Electric Company; Universal Portland Cement Company; Racine Stone Company; and Nancy M. Watrous, trading as G. B. Watrous Sons, do have and recover of and from the defendant, Illinois Surety Company, said debt of Thirty-one Thousand, Forty-seven Dollars and Eighteen Cents (\$31,047.18), and damages of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18), as follows:

For the use of The John Davis Company.....	\$13,659.62
For the use of Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, Deceased.....	514.91
For the use of Standard Underground Cable Co....	2,255.09
For the use of George Racky, doing business as Racky & Sons Iron Works.....	319.37
For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Co.	61.69
For the use of United States Equipment Co.....	157.73
For the use of The Roebling Construction Co....	141.63
For the use of The Western Kiely Steam Specialty Company	122.97
For the use of H. W. Johns-Manville Company....	558.70
For the use of Stebbins Hardware Company.....	140.32
For the use of Commonwealth Edison Company...	60.70
For the use of James B. Clow & Sons.....	1,652.39
For the use of Scott Valve Company.....	229.35
For the use of Electric Appliance Company.....	463.43
For the use of Western Roofing & Supply Company	3,995.34
For the use of Maloney Electric Company.....	5,419.84
For the use of Universal Portland Cement Co.....	819.82
For the use of Racine Stone Company.....	92.87
For the use of Nancy M. Watrous, trading as G. B. Watrous Sons	311.41

together with interest at five per cent. from August 16, 1911, and with their costs and charges, both in the District Court and in this court, in this behalf expended, and have execution therefor.

3. That upon the payment of said damages with interest thereon from August 16, 1911, and costs of suit both in the District Court and in this court, said debt be discharged.

4. That the claims of M. H. Hussey, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, Davies Supply Company, H. Channon Company, Featherstone Foundry & Machine Company, Charles A. Daniel, trading as Quaker City Rubber Company, and each of them, be and they are hereby dismissed, and as to said claims, defendant, Illinois Surety Company, go hence without day and that said defendant, Illinois Surety Company, have and recover its costs and charges in this behalf expended and have execution therefor.

5. That the defendant, W. H. Schott, go hence without day and do have and recover from all of the said for use plaintiffs his costs in the District Court and from all of the for use plaintiffs mentioned in Section 2 of this judgment his costs in this court, and have execution therefor.

6. That this cause be remanded to the District Court with direction to it to enter there the judgment which we have entered here and to enforce said judgment by proper process.

And afterwards, to-wit, on the 9th day of August, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Petition for Writ of Error, which said Petition for Writ of Error is in words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA, for the
 use of THE JOHN DAVIS COMPANY *et*
al.,
Defendants in Error.

No. 2092.

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA, for the
 use of THE JOHN DAVIS COMPANY *et*
al.,
Defendants in Error.

No. 2093.

PETITION FOR WRIT OF ERROR FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, the Illinois Surety Company, Plaintiff in Error in the above entitled cause, respectfully shows that the above entitled causes are now pending as one suit in the United States Circuit Court of Appeals for the Seventh Circuit; that the case was originally tried in the District Court of the United States for the Northern District of Illinois, Eastern Division on the 6th day of Feb. 1914, Judgment was entered by order of said Court in favor of the Illinois Surety Company in case No. 2092 and against the Illinois Surety Company in case No. 2093 that on a writ of error taken to the United States Circuit Court of Appeals for the Seventh Circuit said causes were consolidated and that judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division was reversed in the above cases and the United States Circuit Court of Appeals for the Seventh Circuit on the 6th day of Aug. 1915, ordered and adjudged as follows:

"This cause having come on for hearing upon the opinion of this court filed on the fifth day of January, 1915, and the supplementary opinion filed on the 6th day of August, 1915, upon the special findings of fact made and filed by the Dis-

trict Court of the United States, for the Northern District of Illinois, Eastern Division, upon the record of the trial of said cause in said District Court, upon the briefs filed in this cause, and after argument of counsel, It Is Ordered:

1. That the judgment entered by said District Court be, and the same is hereby reversed.

2. That the United States of America, for the use of The John Davis Company; Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, Deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; The Roebling Construction Company; The Western Kiely Steam Specialty Company; H. W. Johns-Manville Company; Stebbins Hardware Company; Commonwealth Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Charles A. Daniel, trading as Quaker City Rubber Company; Maloney Electric Company; Universal Portland Cement Company; Racine Stone Company; and Nancy M. Watrous, trading as G. B. Watrous Sons, do have and recover of and from the defendant, Illinois Surety Company, said debt of Thirty-one Thousand Forty-seven Dollars and Eighteen Cents (\$31,047.18) and damages of Thirty-one Thousand, Forty-seven Dollars and Eighteen Cents (\$31,047.18), as follows:

For the use of The John Davis Company	\$13,659.62
For the use of Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, Deceased	514.91
For the use of Standard Underground Cable Company	2,255.09
For the use of George Racky, doing business as Racky & Sons Iron Works	319.37
For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company	61.68
For the use of United States Equipment Company	157.77
For the use of The Roebling Construction Company	141.68
For the use of The Western Kiely Steam Specialty Company	122.9
For the use of H. W. Johns-Manville Company	558.7
For the use of Stebbins Hardware Company	140.3

For the use of Commonwealth Edison Company	60.70
For the use of James B. Clow & Sons	1,652.39
For the use of Scott Valve Company	299.35
For the use of Electric Appliance Company	463.43
For the use of Western Roofing & Supply Company	3,995.34
For the use of Maloney Electric Company	5,419.84
For the use of Universal Portland Cement Company	819.82
For the use of Racine Stone Company	92.87
For the use of Nancy M. Watrous, trading as G. B. Watrous Sons	311.41

together with interest at five per cent., from August 16, 1911, and with costs and charges, both in the District Court and in this court, in this behalf expended, and have execution therefor.

3. That upon the payment of said damages with interest thereon from August 16, 1911, and costs of suit both in the District Court and in this court, said debt be discharged.

4. That the claims of M. H. Hussey, James P. Marsh & Company, Raymond Lead Company, George B. Carpenter & Company, Davies Supply Company, H. Channon Company, Featherstone Foundry & Machine Company, and each of them, be and they are hereby dismissed, and as to said claims, defendants, Illinois Surety Company, go hence without day and that said defendant, Illinois Surety Company, have and recover its costs and charges in this behalf expended and have execution therefor.

5. That the defendant, W. H. Schott, go hence without day and do have and recover from all of the said for use plaintiffs his costs in the District Court and from all of the for use plaintiffs mentioned in Section 2 of this judgment his costs in this court, and have execution therefor.

6. That this cause be remanded to the District Court with direction to it to enter there the judgment which we have entered here and to enforce said judgment by proper process."

That the said judgment as now entered in the United States Circuit Court of Appeals for the Seventh Circuit is a final judgment that the matter in controversy in said cause exceeds One Thousand (\$1000.00) Dollars besides costs and that jurisdiction of none of the Courts above mentioned is or was dependent in any ways upon the opposite parties to the suit or controversy being alienists and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws or revenue laws or criminal laws and that it is not an admiralty cause and that it is

a proper cause to be reviewed by the Supreme Court of the United States by writ of error.

And further, your petitioner would respectfully pray that the writ of error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit to send record proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the "Assignment of Errors" herewith filed by said Plaintiff in Error may be reviewed and if error be found, corrected according to the laws and customs of the United States.

ILLINOIS SURETY COMPANY,
By A. J. HOPKINS,
JAMES S. HOPKINS,
Attys. for said Company.

The foregoing petition is granted and writ of error is allowed as prayed for upon Plaintiff in Error giving bond according to law in the sum of Forty Thousand (\$40,000.00) Dollars, said bond to operate as a supersedeas in this case.

KOHLSAAT,
J.

Endorsed: Filed Aug. 9, 1915, Edward M. Holloway,
Clerk.

And, afterwards, to-wit, on the 9th day of August, 1915, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Assignment of Errors, which said Assignment of Errors is in words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	}	No. 2092.
<i>vs.</i>		
UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.,</i>	}	
<i>Defendants in Error.</i>		
ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	}	No. 2093.
<i>vs.</i>		
UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.,</i>	}	
<i>Defendants in Error.</i>		

ASSIGNMENT OF ERRORS.

And now comes the Plaintiff in Error, the Illinois Surety Company by A. J. Hopkins and James S. Hopkins, its attorneys, and says

That judgment in said cause entered in the United States Circuit Court of Appeals for the Seventh Circuit on the Sixth day of August, 1915, is erroneous and against the just rights of the said Plaintiff in Error for the following reasons:

First—Because the Court erred in reversing the judgment entered by the District Court in the above entitled cause in favor of the Plaintiff in Error and against the following named claimants:

- (a) For the use of Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, executors of the will of F. Bairstow, Deceased,
- (b) For the use of George Racky, doing business as Racky & Sons Iron Works,
- (c) For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company,
- (d) For the use of United States Equipment Company,
- (e) For the use of The Western Kiely Steam Specialty Company,
- (f) For the use of H. W. Johns-Manville Company,
- (g) For the use of Stebbins Hardware Company,
- (h) For the use of Commonwealth Edison Company,

- (i) For the use of James B. Clow & Sons,
- (j) For the use of Scott Valve Company,
- (k) For the use of Electric Appliance Company,
- (l) For the use of Western Roofing & Supply Company,
- (n) For the use of Maloney Electric Company,
- (o) For the use of Nancy M. Watrous, trading as G. B. Watrous Sons, and each of them.

Second—Because the United States Circuit Court of Appeals for the Seventh Circuit did not affirm the judgment of the District Court in favor of Plaintiff in Error and against the above named claimants and each of them.

Third—Because the United States Circuit Court of Appeals for the Seventh Circuit in reversing the judgment of the District Court against Plaintiff in Error on the claim of The John Davis Company did not hold that Plaintiff in Error is not liable for said claim or any part of the same.

(a) Because said Court in reversing the judgment of the District Court on the claim of the Standard Underground Cable Company did not hold that Plaintiff in Error was not liable for said claim or any part of the same.

(b) Because said Court in reversing the judgment of the District Court on claim of the Roebling Construction Company did not hold that Plaintiff in Error was not liable for said claim or any part of the same.

(c) Because said Court in reversing the judgment of the District Court on claim of the Universal Portland Cement Company did not hold that Plaintiff in Error was not liable for said claim or any part of the same.

(d) Because said Court in reversing the judgment of the District Court on claim of the Racine Stone Company did not hold that Plaintiff in error was not liable for said claim or any part of the same.

Fourth—Because said United States Circuit Court of Appeals for the Seventh Circuit erred in entering a judgment against Plaintiff in Error.

(a) For the use of The John Davis Company for the sum of \$13,659.62 or for any sum whatever.

(b) Because said Court erred in entering a judgment against Plaintiff in Error for the use of the Standard Underground Cable Company in the sum of \$2,255.09 or for any sum whatever.

(c) Because said Court erred in entering a judgment against Plaintiff in Error for the use of the Roebling Con-

struction Company in the sum of \$141.63 or for any sum whatever.

(d) Because said Court erred in entering a judgment against Plaintiff in Error for the use of the Universal Portland Cement Company in the sum of \$819.82 or for any sum whatever.

(e) Because said Court erred in entering a judgment against Plaintiff in Error for the use of the Racine Stone Company in the sum of \$92.87 or for any sum whatever.

Fifth—Because the Court erred in entering judgment in debt for the full amount of the bond, viz., \$31,047.18.

(a) Because the Court erred in entering a judgment for damages against Plaintiff in Error for the full amount of said bond, viz., \$31,047.18.

(b) Because the Court erred in allowing interest on the various claims that in judgment of debt and damages aggregate the amounts above specified.

(c) Because the Court erred in allowing interest at 5 per cent. from August 16, 1911, in behalf of each of the claimants whose consolidated claims aggregate the amount of damages awarded, viz., \$31,047.18.

Sixth—Because the United States Circuit Court of Appeals for the Seventh Circuit had no authority or lawful right to enter an original judgment in that Court in said cause against Plaintiff in Error.

(a) Because said Court had no authority or lawful right to direct said District Court to enter a specific judgment in this cause.

(b) Because said Court erred in holding that it had jurisdiction to enter an original and final judgment in said Circuit Court of Appeals against said Plaintiff in Error.

(c) Because said Court erred in holding that it had jurisdiction to direct the District Court to enter a specific judgment against Plaintiff in Error.

(d) Because the United States Circuit Court of Appeals for the Seventh Circuit erred in not holding that it was without jurisdiction to enter any order in the premises except to dismiss the case on the ground that it is a suit at common law and as such, cannot be maintained and that the issues involved are equitable and can only be determined in a Court of Equity.

(e) Because said Court erred in entering a judgment against Plaintiff in Error for the full amount of its bond and damages for the use of the above named claimants, viz.:

For the use of The John Davis Company,	\$13,659.62
For the use of Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, Deceased,	514.91
For the use of Standard Underground Cable Company,	2,255.09
For the use of George Racky, doing business as Racky & Sons Iron Works,	319.37
For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company,	61.69
For the use of United States Equipment Company,	157.73
For the use of The Roebling Construction Company,	141.63
For the use of The Western Kiely Steam Specialty Company,	122.97
For the use of H. W. Johns-Manville Company,	558.70
For the use of Stebbins Hardware Company,	140.32
For the use of Commonwealth Edison Company,	60.70
For the use of James B. Clow & Sons,	1,652.39
For the use of Scott Valve Company,	299.35
For the use of Electric Appliance Company,	463.43
For the use of Western Roofing & Supply Company,	3,995.34
For the Maloney Electric Company,	5,419.84
For the Universal Portland Cement Company,	819.82
For the use of Racine Stone Company,	92.87
For the use of Nancy M. Watrous, trading as G. B. Watrous Sons,	311.41
in several sums that would exactly aggregate in damages the amount of Plaintiff in Error's bond, viz., \$31,047.18, whereas the undisputed evidence in the case is that the claims of these several parties are as follows:	
The John Davis Company,	16,661.70
Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased.	628.07
Standard Underground Cable Company,	2,750.70
George Racky, doing business as Racky & Sons Iron Works,	389.55
D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company,	75.25
United States Equipment Company,	192.39
The Roebling Construction Company,	172.68
The Western Kiely Steam Specialty Company,	150.00
H. W. Johns-Manville Company,	681.50

Stebbins Hardware Company,	171.15
Commonwealth Edison Company,	74.04
James B. Clow & Sons,	2,015.54
Scott Valve Company,	365.14
Electric Appliance Company,	565.28
Western Roofing & Supply Company,	4,873.41
Charles A. Daniel, trading as Quaker City Rubber Company,	630.33
Nancy W. Watrous, trading as G. B. Watrous Sons,	379.85
Maloney Electric Company,	6,611.01
which aggregate \$37,387.59.	

Seventh—Because the Court erred in this case which is a case at common law in exercising equitable jurisdiction and determining without any authority either in law or in fact that each of the above named parties for whose several uses the above named judgment against the Plaintiff in Error was rendered were each entitled in judgment to a less amount than the undisputed record evidence shows was their several claims.

(a) Because said Court erred in assuming the right and authority to revise the claims of the several parties for whose use said judgment was entered in said Court and in violation of the facts as appeared in record makes said several claims conform to the several amounts that would aggregate the amount of Plaintiff in Error's bond, viz. \$31,047.18.

Eighth—Because the United States Circuit Court of Appeals for the Seventh Circuit erred in assuming and holding that Section 274a of the Judicial Code which reads as follows:

"Sec. 274a. That in case any of said courts shall find that a suit at law should have been brought in equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

authorize it to revise the claims of each of the claimants named in the "Sixth" Assignment of Errors and make the same conform to the penalty of the bond of the Plaintiff in Error.

(a) Section 274a cannot apply to this case because to do so would make it a retroactive act which it is not.

(b) Even if it applied, the said United States Circuit Court of Appeals did not conform to the requirements of the statute made by transferring the case from the common law side of the docket to the equity side and require amendments that would effectuate this change from common law to equity.

(c) Because the Court erred in assuming that it had authority in a suit at common law to exercise equitable authority over the various claimants mentioned in Assignment of Errors "Sixth" and pro rate the judgment which it rendered among the several claimants mentioned in said "Sixth" Assignment of Errors.

Ninth—Because the said United States Circuit Court of Appeals for the Seventh Circuit is without jurisdiction and authority of law to render an original and final judgment in this case.

The Plaintiff in Error prays for a reversal of the judgment entered against it in the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons assigned above.

ILLINOIS SURETY COMPANY,

By its attorneys,

A. J. HOPKINS,

JAMES S. HOPKINS.

Endorsed: Filed Aug. 9, 1915. Edward M. Holloway,
Clerk.

And, afterwards, on the same day, to-wit: On the 9th day of August, 1915, in the October Term last aforesaid, the following further proceedings were had and entered as record.

Monday, August 9, 1915.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Christian C. Kohlsaat, Circuit Judge, presiding.

Hon. Julian W. Mack, Circuit Judge.

Edward M. Holloway, Clerk.

John J. Bradley, Marshal.

UNITED STATES OF AMERICA for the
use of THE JOHN DAVIS CO. *et al.*,

No. 2092

vs.

ILLINOIS SURETY CO. and W. H.
SCHOTT.

ILLINOIS SURETY COMPANY,

2093

vs.

UNITED STATES OF AMERICA, for the
use of THE JOHN DAVIS CO., *et al.*

Error to the District Court
of the United States for the
Northern District of Illinois,
Eastern Division.

Error to the District Court of
the United States for the
Northern District of Illinois,
Eastern Division.

Now comes plaintiff in error by its counsel, Mr. Albert J. Hopkins, and presents his petition for writ of error in the Supreme Court of the United States in this cause. Thereupon it is ordered by the Court that the petition be allowed, that writ of error issue, and that the mandate of this Court be stayed until the further order of this court.

And, afterwards, to-wit, on the 17th day of August, 1915, in the October term last aforesaid, there was filed in the office of the Clerk of this Court, a certain Appeal Bond, which said Appeal Bond is in words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
For the Seventh Circuit.

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	}	No. 2092.
<i>vs.</i>		
UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.</i> , <i>Defendants in Error.</i>		

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i>	}	No. 2093.
<i>vs.</i>		
UNITED STATES OF AMERICA, for the use of THE JOHN DAVIS COMPANY <i>et</i> <i>al.</i> , <i>Defendants in Error.</i>		

BOND

Know All Men By These Presents, That we, the Illinois Surety Company, a corporation of the State of Illinois, having its office at 134 South La Salle Street, Chicago, Illinois, as Principal, and the United States Fidelity & Guaranty Company, a corporation of the state of Maryland, duly authorized to transact the business of indemnity and suretyship and having an office and principal place of business in the state of Illinois, at 134 South La Salle Street, Chicago, as Surety, are held and firmly bound unto The John Davis Company; Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; The Roebling Construction Company; The Western Kiely Steam Specialty Company; H. W. Johns-Manville Company; Stebbins Hardware Company; Commonwealth Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Charles A. Daniel, trading as Quaker City Rubber Company; Maloney Electric Company; Universal Portland Cement Company; Racine Stone Company; and Nancy M. Watrous, trading as G. B. Watrous Sons, in cases No. 2092 and 2093, in the sum of Forty

Thousand (\$40,000) Dollars, lawful money of the United States of America, for the payment thereof, well and truly to be made, they bind themselves, their successors and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of August, in the year of our Lord Mth thteen Hundred and Fifteen.

Whereas, the said Uth States Circuit Court of Appeals for the Seventh Circuit on the 6th day of August, 1915, enter a judgment against Plaintiff in Error, the Illinois Surety Company, in the sum of Thirty-one Thousand, Forty-seven Dollars and Eighteen cents (\$31,047.18) and interest on the same, in favor of the above named parties who are in this proceeding made Defendants in Error, and the Illinois Surety Company has prosecuted or is about to prosecute a writ of error to the Supreme Court of the United States, to reverse the judgment entered by the United States Circuit Court of Appeals for the Seventh Circuit.

Now Therefore, The Condition Of This Obligation Is Such, that if the above named Illinois Surety Company, Plaintiff in Error, shall prosecute its writ of error with effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

ILLINOIS SURETY COMPANY,
By A. J. HOPKINS,
President.

Attest:

CHAS. E. SCHICK,
Secretary.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN I. SAULL,
Attorney-in-Fact.

Attest:

HENRY M. MARSHALL,
Attorney-in-Fact.

Approved to operate as a supersedeas.

KOHLSAAT
*United States Circuit Judge and Judge of
the United States Circuit Court of Ap-
peals, Seventh Circuit.*

Endorsed: Filed Aug. 17, 1915. Edward M. Holloway,
Clerk.

United States
of America, } ss.

The President of the United States, To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Seventh Circuit before you, or some of you, between Illinois Surety Company, plaintiff in error, and The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; The Roebling Construction Company; The Western Kiely Steam Specialty Company; H. W. Johns-Manville Company; Stebbens Hardware Company; Commonwealth Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Maloney Electric Company; Universal Portland Cement Company; Racine Stone Company; Nancy M. Watrous, trading as G. B. Watrous Sons, defendants in error, a manifest error hath happened, to the great damage of the said Illinois Surety Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court of the United States, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of

the United States, the ninth day of August, in the year of our Lord one thousand nine hundred and fifteen.

(Seal) EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Allowed by
CHRISTIAN C. KOHLSAAT
JULIAN W. MACK
Circuit Judges.

United States of America }
Seventh Judicial Circuit. } ss.

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this nineteenth day of August, A. D. 1915.

(Seal) EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

(Copy deposited for the defendants in error in the Clerk's office of the United States Circuit Court of Appeals for the Seventh Circuit.)

Endorsed: Filed August 9, 1915. Edward M. Holloway,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 563 to 606, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel, the Petition for Rehearing, the Proof of Service of same and the Answer to the Petition for Rehearing) in the case of

The United States of America for the Use of The John Davis Company *et al.*,

vs

Illinois Surety Company and W. H. Schott.

Illinois Surety Company,

vs.

United States of America, for the use of The John Davis Co.,
et al.

No. 2092, October Term, 1913, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-seventh day of August A. D. 1915.

(Seal)

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

610

United States }
of America, } ss.

The President of the United States, To The John Davis Company, Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the Will of F. Bairstow, Deceased; Standard Underground Cable Company; George Racky, doing business as Racky & Sons Iron Works; D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company; United States Equipment Company; The Roebling Construction Company; The Western Kiely Steam Specialty Company; H. W. Johns-Manville Company; Stebbens Hardware Company; Commonwealth Edison Company; James B. Clow & Sons; Scott Valve Company; Electric Appliance Company; Western Roofing & Supply Company; Maloney Electric Company; Universal Portland Cement Company; Racine Stone Company; Nancy M. Watrous, trading as G. B. Watrous Sons. Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Seventh Circuit, wherein the Illinois Surety Company is the plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Christian C. Kohlsaat, United States Circuit Judge for this the Seventh Judicial Circuit and one of the Judges of the United States Circuit Court of Ap-

peals, this ninth day of August, in the year of our Lord one thousand, nine hundred and fifteen.

KOHLSAAT,
*United States Circuit Judge, Seventh
Judicial Circuit.*

Service of citation accepted by all of the above named Defendants in Error.

(Signed) THE JOHN DAVIS COMPANY, EMMA E. BAIRSTOW, GEORGE H. BAIRSTOW AND JESSIE B. BLACKMAN, EXECUTORS OF THE WILL OF F. BAIRSTOW, DECEASED, AND UNIVERSAL PORTLAND CEMENT COMPANY,
By WILLIAM D. MCKENZIE AND RALPH E. CHURCH,

Their Attorneys.

STANDARD UNDERGROUND CABLE COMPANY, GEORGE RACKY, DOING BUSINESS AS RACKY & SONS IRON WORKS; D. E. GARRISON, JR., DOING BUSINESS AS GARRISON & COMPANY AND CORRUGATED BAR COMPANY; UNITED STATES EQUIPMENT COMPANY; THE ROEBLING CONSTRUCTION COMPANY; THE WESTERN KIELY STEAM SPECIALTY COMPANY; H. W. JOHNS-MANVILLE COMPANY; STEBBINS HARDWARE COMPANY; COMMONWEALTH EDISON COMPANY; SCOTT VALVE COMPANY; ELECTRIC APPLIANCE COMPANY; MALONEY ELECTRIC COMPANY AND RACINE STONE COMPANY,

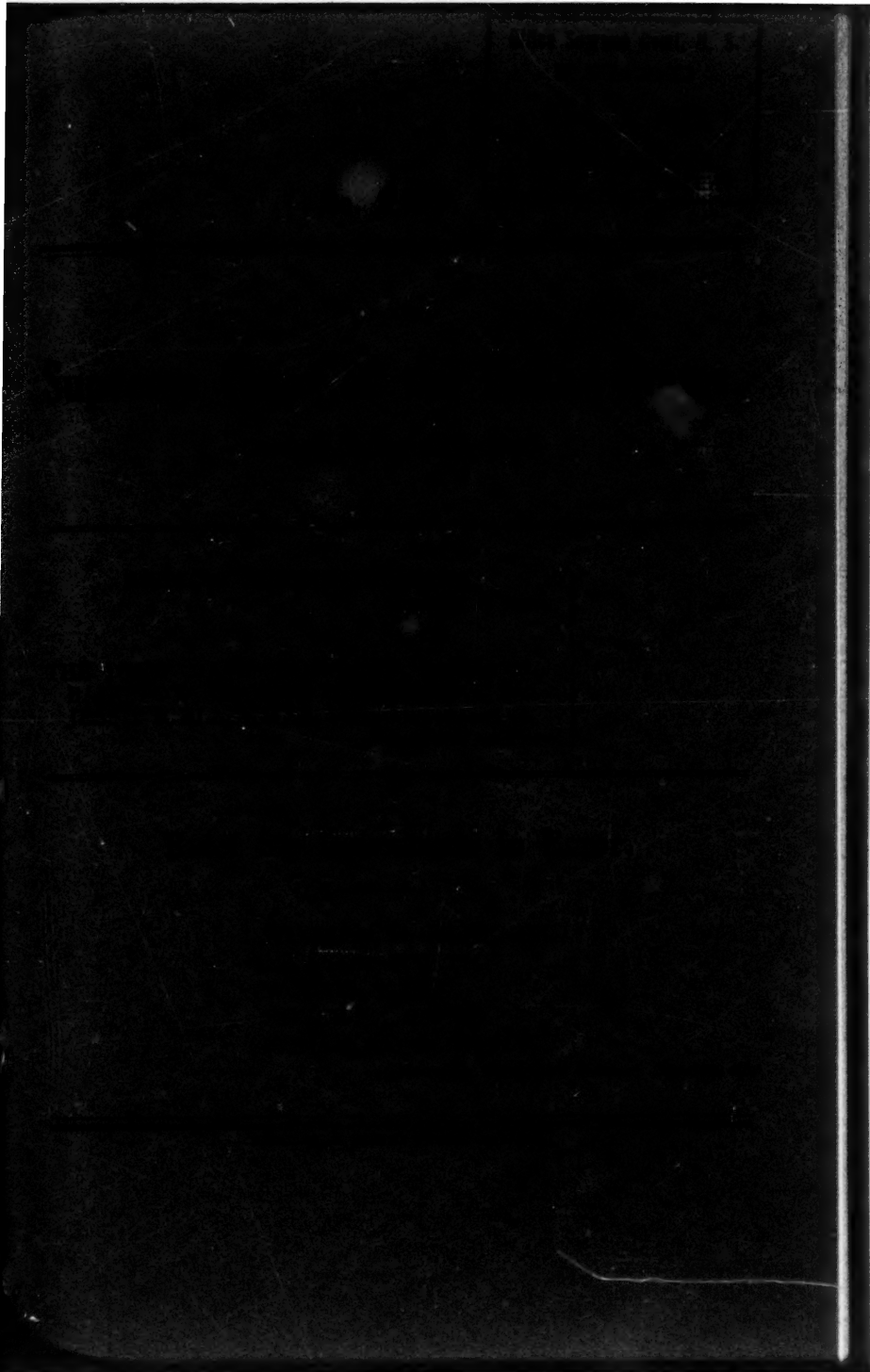
By NEWTON WYETH,
Attorney.

WESTERN ROOFING & SUPPLY COMPANY,
By CHARLES S. HOLT,
Its Attorney.

NANCY M. WATROUS, DOING BUSINESS AS G. B. WATROUS SONS,
By E. C. CRAWFORD,
Her Attorney.

JAMES B. CLOW & SONS,
By F. HAROLD SCHMITT and
GLENNON, CARY, WALKER & HOWE,
Attorneys.

August 19, 1915.





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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1916.

ILLINOIS SURETY COMPANY, <i>Plaintiff in Error,</i> <i>vs.</i>	}	No. 235.
THE JOHN DAVIS COMPANY, EMMA E. BAIRSTOW, GEORGE H. BAIRSTOW, and JESSIE B. BLACKMER, Executors etc., et al.,		
<i>Defendants in Error.</i>		

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

We restate briefly the facts of this case because by so doing we believe we will lessen the work of the court.

For the sake of brevity we shall hereafter refer to W. H. Schott as "Schott"; to Illinois Surety Company as the "Surety Company"; to the for use plaintiffs as the "claimants"; to the Schott Engineering Company as the "Engineering Company," and to the John Davis Company as the "Davis Company."

In this writ of error four questions are involved:

1. Was the Surety Company released from liability by the transfer of the business of Schott to the Engineering Company during the progress of the work?
2. Are the claimants estopped by anything they have done from enforcing the liability upon the bond?
3. Are the claimants entitled to interest upon their claims?
4. Is rental for equipment furnished to the contractor labor or materials within the meaning of the act?

1. The contract secured by the bond was entered into between Schott and the United States July 30, 1908. It provided for the installation at the Naval Training Station at North Chicago of heating and electrical distribution mains and concrete tunnels. Schott completed a large part of the work between the execution of the contract and January 2, 1909, when he transferred his entire business to the Schott Engineering Company, of which he became the president, and which he managed subject to a creditors' committee which had been controlling his business prior to the transfer and at the time the agreement with the United States was entered into. The Surety Company was not advised of the transfer of Schott's business. (Rec., 501-510.)

The claims are based in part upon labor and material furnished to Schott personally and in part upon labor and material furnished to the Engineering Company.

The District Court held that the assignment discharged the surety as to all material furnished to

the Engineering Company, but held the Surety Company liable for the labor and material furnished to Schott personally and rendered judgment therefor as follows:

The John Davis Company	\$11,118.72
Universal Portland Cement Co..	1,123.83
Standard Underground Cable Co.	2,880.69
Racine Stone Company	127.28
Roebbling Construction Co.	82.72

The Circuit Court of Appeals reversed this judgment and held that the surety was liable for the labor and material furnished to the Engineering Company as well as for that furnished to Schott personally, and a judgment was entered by the latter court for the full amount of the bond. The total claims involved in this writ of error amount to \$37,870.54, while the amount of the bond is \$31,047.18. (Rec., 533, 549, 591.)

2. After Schott transferred his business including his agreement with the Government to the Engineering Company all of the claimants except one furnished material to the Engineering Company. One of them stated an account with the Engineering Company covering material delivered to Schott personally and accepted part payment of this account. After the Engineering Company was thrown into bankruptcy, several of the claimants filed claims against his estate. A few of them sold material to the receiver appointed for the Engineering Company's business, and one of them consented to the completion by the receiver of the work called for by the contract in question.

The Davis Company was represented by its presi-

dent upon a creditors' committee which was in substantial control of Schott's business at the time the contract with the Government was entered into. Acting under the advice of this committee, Schott organized the Engineering Company and transferred to it his business. The Davis Company's president became one of the directors of the Engineering Company.

Because of these facts it is contended that the claimants are estopped from recovering for the labor and material furnished to Schott personally as well as for that furnished to the Engineering Company.

3. The District Court held that the claimants were entitled to interest from the date of the commencement of the suit upon their claims for material furnished to Schott personally. The Circuit Court of Appeals entered a judgment for the full amount of the bond together with interest from the date of the commencement of the suit. All of the claims were liquidated, and there has never been any question in the case about the amounts of the claims.

4. The United States Equipment Company furnished certain heavy equipment to Schott to enable him to perform his contract. This equipment was used by him and later by the Engineering Company. The Circuit Court of Appeals in reversing the District Court held that this equipment was within the terms of the bond.

Western Roofing & Supply Company entered into an agreement with Schott before the transfer of his business to furnish certain material. This company will file a separate brief in which the questions peculiar to its claim will be covered.

Schott filed a plea setting up his discharge in bankruptcy (Rec., 14), and a judgment was entered for him as against the claimants.

The opinion of the Circuit Court of Appeals is found at pages 568 to 577, and the judgment at pages 590 to 592 of the record.

BRIEF OF ARGUMENT.

I.

ASSIGNMENT OF CONTRACT.

THE BOND WAS GIVEN TO SECURE THE PAYMENT OF ALL LABOR AND MATERIALS ACTUALLY USED IN THE WORK PROVIDED BY THE CONTRACT AND THE ASSIGNMENT OF THE CONTRACT DID NOT AFFECT THE LIABILITY UPON THE BOND.

Act of Congress approved February 24, 1905, 33 Stat. L., page 811.

(a) The statute and bond should be construed liberally. The rule applying to personal sureties that their contracts should be strictly construed does not apply to surety companies.

Guaranty Co. v. Pressed Brick Co., 191 U. S. 416.

Hill v. American Surety Co., 200 U. S. 197, 202.

Baglin v. Title, Guaranty & Surety Co., 166 Fed. 356, 363.

United States F. & G. Co. v. United States, 178 Fed. 692, 695.

Atl. Trust & Deposit Co. v. Town of Laurinburg, 163 Fed. 690, 695.

United States v. Lynch, 192 Fed. 364, 369.

(b) The purpose of the act was to provide security for the payment of all persons furnishing la-

bor and materials and to provide a substitute for the usual mechanic's lien.

Hill v. American Surety Co., 200 U. S. 197.

Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 537.

As to the United States there was no assignment of the contract.

Revised Statutes, Section 3737.

The Government was directly interested in the payment of all laborers and material men and the obligation of the bond for such payment was for the benefit both of the Government and of the laborers and material men.

U. S. Fidelity Company v. Kenyon, 204 U. S. 349, 356.

U. S. v. Churchyard, 132 Fed. 82, 85.

Baker & Co. v. Bryan, 64 Iowa 561.

Knapp v. Swaney, 56 Mich. 345, 349.

City of St. Louis v. Von Phul, 133 Mo. 561, 566.

It was only requisite that the material and labor should go into the work under the contract.

Hill v. American Surety Co., 200 U. S. 197, 203-205.

Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 537.

Title Guarantee & Trust Co. v. Crane Co., 219 U. S. 24, 32.

United States v. National Surety Co., 92 Fed. 549.

Title Guaranty & Trust Co. v. Puget Sound Engine Works, 163 Fed. 168.

United States Fidelity & Guaranty Co. v. United States, 189 Fed. 339.

Heine Safety Boiler Co. v. United States, 35 App. Cas., D. C., 273, 277.

It is immaterial that the assignee or subcontractor was unknown to the surety, as it contracted for an uncertain liability.

Heine Safety Boiler Co. v. U. S., 35 App. Cas. D. C. 273, 277.

American Bonding Company v. United States, 233 Fed. 364-369.

In several cases it has been expressly held that an assignment of the contract does not relieve the surety upon such a bond.

Mullin v. United States, 109 Fed. 817.

City Trust Safe Deposit & Surety Co. v. United States, 147 Fed. 155.

Board of Education v. United States Fidelity & Guaranty Co., 166 Mo. App. 410.

Freeman v. Berkey, 45 Minn. 438.

Abbott v. Morrisette, 46 Minn. 10.

Kaufman v. Cooper, 46 Neb. 644.

Leader Printing Co. v. Lowry, 9 Okla. 89.

Mundt v. Sheboygan, etc., R. R. Co., 31 Wis. 451.

Before the Surety Company executed the bond this Court had already held that the United States was interested in the payment of labor and material furnished under such a contract and that the surety was necessarily contracting with reference to an uncertain liability.

Guaranty Company v. Pressed Brick Company, 191 U. S. 416.

Hill v. American Surety Co., 200 U. S. 197.

U. S. Fidelity Co. v. Kenyon, 204 U. S. 349, 356.

(c) The cases upon which the Surety Company relies either involve the rules governing the liability

of personal sureties or do not bear upon the questions raised by the writ of error, with two exceptions, one of which appears to be authority for the claimants and the other of which has been so distinguished by a later decision as to be authority for the claimants.

Hardaway v. National Surety Co., 211 U. S. 552.

Hardaway v. National Surety Co., 150 Fed. 465.

Board of Education v. U. S. Fidelity & Guaranty Co., 155 Mo. App. 109.

Board of Education v. U. S. Fidelity & Guaranty Co., 166 Mo. App. 410.

II.

ESTOPPEL.

THE CLAIMANTS WERE NOT ESTOPPED FROM ENFORCING THE LIABILITY ON THE BOND (1) BY FILING CLAIMS AGAINST THE ESTATE IN BANKRUPTCY OF THE ENGINEERING COMPANY, (2) BY CONSENTING TO THE COMPLETION OF THE WORK BY THE RECEIVER OF THE ENGINEERING COMPANY, (3) BY DEALING WITH THE ENGINEERING COMPANY, (4) BY CONSENTING TO AND ADVISING THE SALE OF SCHOTT'S BUSINESS TO THE ENGINEERING COMPANY, (5) BY STATING AN ACCOUNT WITH THE ENGINEERING COMPANY, OR (6) BY ACCEPTING PART PAYMENT FROM THE ENGINEERING COMPANY.

(a) The acts of the claimants of which complain is made do not contain the elements of an estoppel. There was no misrepresentation of a material fact upon which the Surety Company acted to its injury.

Leather Manufacturers Bank v. Morgan,
117 U. S. 96, 109.

Dickerson v. Colgrove, 100 U. S. 578, 580.
Bigelow Law of Estoppel, Fourth Ed., page 552.

(b) Statements made in the claims filed against the estate of the Engineering Company in bankruptcy amounted only to evidence that the Engineering Company was liable for the indebtedness and did not constitute a judicial admission or an estoppel. There was no inconsistency in the claimants' efforts to hold both the Engineering Company and Schott personally.

Wigmore on Evidence, Vol. 2, Sec. 1065.

Blanks v. Klein, 53 Fed. 436.

Hunter v. Hunter, 31 L. R. A., 411 (Cal.).

Snydacker v. Brosse, 51 Ill. 357.

Quimby v. Carhart, 133 N. Y. 579.

Robrecht v. Marling, 29 W. Va. 765.

C., R. I. & P. Ry. Co. v. Mashore, 96 Pac. 630.

Title Guaranty & Surety Co. v. U. S., 187 Fed. 98.

(c) The claimants were not parties to the agreement between Schott and the Engineering Company. They did not release Schott by express agreement and the fact that they dealt with the Engineering Company, accepted part payment from it, and one of them stated an account with it did not amount to an estoppel, a ratification of the assignment, or a novation.

Mankin v. Ludowici-Celadon Co., 215 U. S. 533, 540.

American Paper Bag Company v. Van Nortwick, 52 Fed. 752, 754.

Illinois Car and Equipment Co. v. Linstroth Wagon Company, 112 Fed. 737, 740.

Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 721, 739.

Lombard v. Anglo-American Land M. & A. Co., 196 U. S. 638.

Grommes v. St. Paul Trust Co., 147 Ill. 634.

Harrington-Wiard Co. v. Blomstrom Mfg. Co., 166 Mich. 276.

United States v. American Bonding & Trust Company, 89 Fed. 925.

III.

INTEREST.

THE CLAIMANTS ARE ENTITLED TO RECOVER INTEREST UPON THEIR CLAIMS THE AMOUNTS OF WHICH WERE LIQUIDATED AND UNDISPUTED FROM THE DATE OF THE COMMENCEMENT OF THIS ACTION AND DAMAGES WERE PROPERLY ASSESSED FOR THE AMOUNT OF SUCH INTEREST IN ADDITION TO THE PENALTY OF THE BOND.

The question of interest should be determined in accordance with the laws of Illinois.

Scotland County v. Hill, 132 U. S. 107, 117.

United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 530.

Under the statutes of Illinois, as construed by the Supreme Court of Illinois, the Surety Company was liable to the claimants for interest in excess of the penalty of the bond.

Section 2 of Chapter 74, Revised Statutes of Illinois, 1913, p. 1488.

Holmes v. Standard Oil Co., 183 Ill. 70.

The federal and state courts have uniformly allowed interest in addition to the penalty of the bond where the damages were liquidated.

Ives v. The Merchants Bank of Boston, 12 How. 159, 164, 165.

United States v. Curtis, 100 U. S. 119, 123.

United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 530.

United States v. McMullen, 222 U. S. 460, 467, 468.

United States v. Quinn, 122 Fed. 65, 66.

Bank of Brighton v. Smith, 12 Allen 243, 252.

Clark, Guardian, v. Wilkinson, 59 Wis. 543.

Long's Adm'r v. Long, 16 N. J. Eq. 59, 67.

Gloucester City v. Eschbach, 54 N. J. L. 150, 155.

Wyman v. Robinson, 73 Me. 384, 387.

55 Lawyers Reports Ann. 384. (Note.)

Brandt, Suretyship, 2nd Ed., p. 163.

IV.

RENTAL.

RENTAL DUE FOR CARS, TRACK AND OTHER EQUIPMENT
FURNISHED TO THE CONTRACTOR IS PROTECTED BY THE
STATUTE AND THE BOND.

American Surety Co. v. Lawrenceville Cement Co., 110 Fed. 717.

Title Guaranty & Trust Co. v. Puget Sound Engine Works, 163 Fed. 168, 179.

Safe Deposit & Surety Co. v. U. S., to use of Bryant et al., 147 Fed. 155.

ARGUMENT.

I.

ASSIGNMENT OF CONTRACT.

THE BOND WAS GIVEN TO SECURE THE PAYMENT OF ALL LABOR AND MATERIALS ACTUALLY USED IN THE WORK PROVIDED BY THE CONTRACT, AND THE ASSIGNMENT OF THE CONTRACT DID NOT AFFECT THE LIABILITY UPON THE BOND.

The main issue in this case is whether the assignment of the contract operated to release the surety upon the bond. The contract secured by the bond was executed July 30, 1908, and provided for the installation at the Naval Training Station, North Chicago, Illinois, of heating and electrical distribution mains and concrete tunnels. By January 2, 1909, a substantial part of the work had been completed. During the latter half of 1908 some of the claimants in this suit had furnished labor and material to Schott personally, which had not been paid for at the time the suit was commenced.

For a long time Schott had been in financial difficulties. At the time of the execution of the contract sued upon, Schott was conducting his business under the advice of a Creditors' Committee. Conferences between Schott and this committee finally resulted in the organization of the Schott Engineering Company, a Maine corporation, to which all of Schott's business, including the contract in question, was transferred on January 2, 1909.

All of the stock of this corporation was issued to Schott as the consideration for the transfer. At the time of the transfer no one but Schott was financially interested in the corporation, but later Schott sold about \$36,300 of preferred stock to outside parties. The members of the Creditors' Committee became directors in the corporation and Schott continued the business under their direction, as he had before the organization of the corporation. (Rec., 199, 200, 217, 503-510.)

The transfer of Schott's assets to the corporation was not known to the Surety Company until both Schott and the corporation went into bankruptcy. (Rec., 509.) From January 2, 1909, until January 14, 1910, when it went into bankruptcy, the Engineering Company continued the performance of the contract, but failed to pay for a large amount of labor and material which went into the work. (Rec., 509.)

The condition of the bond, in so far as it is material, is as follows:

"The condition of the above bond is such, that if the said above bonded principal, W. H. Schott, his or their heirs, successors, executors or administrators * * * shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect, otherwise to remain in full force and virtue." (Rec., 502.)

The bond was given under an Act of Congress approved February 24, 1905, 33 Stat. L., 811, 10 Fed. Stat. Ann., 343, entitled "An Act for the protection of persons furnishing materials and labor for

the construction of public works," which, for the convenience of the Court, is quoted at length:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled 'An Act for the protection of persons furnishing materials and labor for the construction of public works,' approved August thirteenth, eighteen hundred and ninety-four, is hereby amended so as to read as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and

materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later. And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability; Provided further, That in all suits instituted under the

provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.' "

(a) THE STATUTE AND BOND SHOULD BE CONSTRUED LIBERALLY.

In determining whether the bond and statute cover all labor and material actually furnished for and used in the work, the bond and statute should be construed liberally, with a view to accomplishing the purpose of the statute. The rule applying to personal sureties, that their contracts should be strictly construed, does not apply to surety companies, but by a long line of decisions it is now held that their contracts shall be construed in the light of principles applicable to insurance companies.

That this particular statute should be so construed was held in *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 426, where the Surety Company defended on the ground that the principal had given an extension of time to plaintiff, but this Court said:

"The rule of *strictissimi juris* is a stringent one and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally

in favor of the subcontractor with a view of furthering the beneficent object of the statute."

In *Hill v. American Surety Co.*, 200 U. S. 197, 202, a suit brought by persons who had furnished material to a subcontractor, this Court held that the plaintiffs could recover, saying:

"The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials."

This same thought was expressed in *Baglin v. Title Guaranty & Surety Co.*, 166 Fed. 356, 363:

"Nor is there any reason to be astute in looking about for flaws that may invalidate the transaction. The defendant is not entitled to the tender consideration that is accorded to an individual surety who is a mere volunteer. Surety companies are not to be so described; they are insurers, paid for their services, bound by contracts which are usually carefully drawn by themselves, and, as a general rule, satisfactorily secured by counter indemnity. They perform a most useful, and indeed, according to modern custom, an indispensable, function in the business and legal world, but they differ so much from an individual surety of the ordinary type as to render inapplicable some of the reasons that have led the courts to guard the rights of the individual surety with jealous care."

The same view is expressed in other cases.

U. S. Fidelity & Guaranty Co. v. U. S., 178 Fed. 692, 695.

Atl. Trust & Deposit Co. v. Town of Laurinburg, 163 Fed. 690, 695.

United States v. Lynch, 192 Fed. 364, 369.

From these cases it would seem clear that the transfer of the contract from Schott to the Engineering Company should not relieve the surety unless it is shown both that the hazard of the Surety Company was increased and that the risk was one not contemplated by the contract of surety. As to the former, the surety was actually benefited by the transaction, as Schott, by the sale of stock, was able to put over \$36,000 of new money into his business. (Rec., 505.) The Surety Company lost nothing, for as between the Surety Company and Schott, the Surety Company was only secondarily liable upon the bond. It was protected by all of the assets which Schott had formerly possessed, by his personal responsibility and by the addition of \$36,000 to his business. For practical purposes, Schott merely changed his manner of doing business from individual to corporate form. Subject to the Creditors' Committee, Schott managed the business after the organization of the corporation just as he had before. He sold some preferred stock to outsiders, but there was no change in the management. Some of his old employes became directors and officers in the new company, but each of them held only a single share of stock, and so far as appears, had no different relationship to the business after the incorporation than before. All in all, it was merely a continuation of the old business with additional capi-

tal added. All of the evidence upon this subject is found in the testimony of Mr. Schott and Mr. Hibbard. (Rec., 190, 182.)

(b) THE PURPOSE OF THE ACT WAS TO PROVIDE SECURITY FOR THE PAYMENT OF ALL PERSONS FURNISHING LABOR AND MATERIALS.

This is clearly shown by the title of the act itself, which reads:

“An Act for the protection of persons furnishing materials and labor for the construction of public works.”

The Act provides that any one “who has furnished labor or materials used in the construction or repair of any public building or public work and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor.” The courts have concluded from the title of the Act and from the expression quoted above, that it was the intention of Congress to give protection to all who furnish labor and material actually used in the work called for by the contract secured by the bond.

The purpose of the Act was considered by this Court in *Hill v. American Surety Company*, 200 U. S. 197, 203-205, where the surety defended upon the ground that the material was furnished to a subcontractor and not directly to the principal in the bond. The suit was brought under the old Act of 1894, but that act was construed in the light of the Act of 1905. The lower court had construed the Act to apply only to those furnishing material to

the principal contractor. We quote at length from this opinion, because in our judgment it is decisive of the issues in the case at bar:

“As against the United States no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual.

* * * But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end. * * * Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work. * * * But all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be ‘supplied’ to the contractor in the prosecution of the work provided for. How supplied, is not stated, and could only be known as the work advanced and the labor and material are furnished. * * *

We cannot conceive that this construction works any hardship to the surety. The contractor gets the benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are secured against loss, by requiring those with whom he deals to give security by a bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure. * * * The obligation is ‘to make full payments to all persons supplying it with labor or materials in the

prosecution of the work provided for in said contract.' This language, read in the light of the statute, looks to the protection of those who supply the labor or materials provided for in the contract, and not to the particular contract or engagement under which the labor or materials were supplied."

Under the Hill case, Schott could have sublet any or all of the contract without relieving the surety from liability to those who furnished labor and materials to the subcontractors. The surety contracted with the knowledge that Schott might sublet all or any part of the work. As the Court says, if the surety wished protection, it should have required Schott to take bonds from the subcontractors, or, in this case, from the Engineering Company. Under the Act as construed by the courts, the surety contracted for a liability for all labor and materials actually going into the work, whether furnished to Schott or to persons or corporations doing the work for Schott.

Furthermore, as to the United States there was no assignment of the contract. Section 3737 of the Revised Statutes of the United States provides:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

So far as the United States was concerned, this was not a technical assignment of the contract, but only a subletting. Schott was still liable to the

United States for complete performance of the contract, as was the Surety Company. A part of this liability was the payment to all persons furnishing labor and materials; and this was a term of the agreement in which the Government was directly interested.

The Government was directly interested in the payment of all laborers and material men and the obligation of the bond for such payment was for the benefit both of the Government and of the laborers and material men. The counsel for the Surety Company urges that this statute preventing the assignment of Government contracts is immaterial because the bond has a dual nature and the Government is not interested in the condition for the benefit of laborers and material men. While it has been held in some cases that such a bond is of a dual nature and that the provisions for the Government and for laborers and material men are distinct and separate, it has never been held that the Government was not directly interested in these provisions. At the time the agreement between Schott and the United States was assigned to the Engineering Company but one of the claimants had an executory agreement with Schott. With this exception there was no existing agreement between Schott and the creditors so that at the time of the assignment the only person interested in the fulfillment of the condition for the benefit of laborers and material men was the Government, and as to the Government the assignment was not effective but merely constituted a subletting. That the United States has a direct interest in the performance of both conditions of the bond was held by this Court in *United States Fidelity*

& *Guaranty Company v. Kenyon*, 204 U. S. 349, 356, a suit similar to the instant case, where it was said:

"The United States is not here a merely nominal or formal party. It has the legal right, was a principal party to the contract, and, in view of the words of the statute, may be said to have an interest in the performance of all its provisions. It may be that the interests of the Government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies promptly and with certainty. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the Government would exert its power directly for their protection. It may well have thought that the Government was under some obligation to guard the interests of those whose labor and materials would go into a public building."

In *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 537, speaking of a similar bond, this Court said:

"It was intended thereby to provide indemnity for a person or persons who furnish labor or materials to the sub-contractor, thereby enabling the contractor to meet his engagement to supply the material and labor necessary to the construction of a public building."

There are many other cases to the same effect.

U. S. v. Churchyard, 132 Fed. 82.

Baker & Co. v. Bryan, 64 Ia. 561, 565.

Knapp v. Swaney, 56 Mich. 345, 349.

City of St. Louis v. Von Phul, 133 Mo. 561, 566.

The construction of the statute adopted in the *Hill* case has been followed in several subsequent decisions. In *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 537, 539, it was held that persons supply-

ing material to a sub-contractor could recover upon the bond notwithstanding the sub-contractor had been paid in full by the contractor. In this case it was contended that the act of 1905 differed from the act of 1894 in that the latter act did not cover material furnished to sub-contractors, but the court said:

“The additional phrase used in this connection, ‘the person or persons supplying the contractor with labor and materials,’ it is contended, shows that only those who furnish labor and materials directly to the contractor come within the benefit of the act. We cannot agree with this contention. The phrase, ‘person or persons supplying the contractor with labor and materials,’ are the words embodied in both statutes alike in the requirement of a bond for their benefit. In the Hill case it was distinctly held that ‘persons supplying the contractor with labor and materials’ included not only the sub-contractor, but any one who furnished labor and materials to the sub-contractor for carrying out the work contracted for. There is nothing in the provision as to who shall have a copy of the bond for the purpose of suit which changes or limits the obligation of the bond under identical requirements in both statutes, alike embracing, as construed in the Hill case, persons furnishing labor and materials to a sub-contractor.”

Upon the following page, in speaking of the lack of notice to the contractor of debts due the sub-contractors, the Court said:

“Such provision is found in some of the state statutes, and is made a condition of recovery in some of the mechanics’ lien acts; but this case is controlled by the Federal act under consideration and the obligation of the bond, *which requires payment to all persons supplying labor and material in the prosecution of the work contemplated by the contract.*”

This act was held to apply to a vessel in *Title Guaranty & Trust Co. v. Crane Co.*, 219 U. S. 24, 32, where the court said:

“For it refers to the statute and says that it was in recognition of the inability of such persons to take liens upon the public property of the United States that Congress passed the act, and adds that in view of this purpose to provide protection for those who could not protect themselves the statute has been given liberal construction by this court.”

In 1899 the Circuit Court of Appeals for the Eighth Circuit, in *United States v. National Surety Co.*, 92 Fed. 549, 551, deciding that the consent of the Government to a change in the contract after the bond was executed did not relieve the surety, said:

“Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works. Inasmuch as such persons could claim no lien thereon, whatever the local law might be for the labor and materials so supplied.”

The Circuit Court of Appeals of the Ninth Circuit, in *Title Guaranty & Trust Co. v. Puget Sound Engine Works*, 163 Fed. 168, 174, held that the act applied to a vessel, saying:

“By keeping in mind that the intent of the statute is that material and labor actually contributed to the construction of the work shall be paid for and thus that the material men and laborer shall be protected, construction of the statute and bond is quite simple.”

The Circuit Court of Appeals of the Second Circuit, in *United States Fidelity & Guaranty Co. v. United States*, 189 Fed. 339, 341, in holding that the act applied to labor required in getting out stone

at the quarry and loading it for transportation, quoted from the Hill case as follows:

“Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work.”

It is immaterial that the assignee or sub-contractor was unknown to the surety, as it contracted for an uncertain liability. In the plaintiff in error's brief great stress is laid upon the argument that it is unfair to the Surety Company to hold it liable for the defaults of the Engineering Company because it contracted only for Schott's defaults and relied upon his ability, character and property. This is precisely the argument which was made in the Hill case and the other cases where it has been held that the surety is liable for material and labor furnished to sub-contractors. At the time the bond was executed the Surety Company could not possibly know who would be the sub-contractors under Schott. It was contracting with reference to an unknown and uncertain liability, namely, a liability to any one who might furnish the material and labor called for by the agreement with the Government. This is well stated by the Circuit Court of Appeals of the Third Circuit in *American Bonding Company v. United States*, 233 Fed. 364, 369, where the court says:

“It usually happens—as it happened in the case before us—that the bond is given before the principal contractor agrees with his sub-contractors, and therefore before the surety can know the terms of the sub-contracts; since the surety ‘deliberately contracts for an uncertain liability he ought not to complain when that uncertainty becomes certain.’”

To the same effect is *Heine Safety Boiler v. U. S.*, 35 App. Cas. D. C. 273, 277:

"In fact, the covenant is made especially for the benefit of those sub-contractors and material men unknown to the guarantor who may furnish material and labor for the principal."

In several cases it has been expressly held that an assignment of the contract does not relieve the surety upon such a bond.

The Circuit Court of Appeals of the Second Circuit so held in *Mullin v. United States*, 109 Fed. 817, 819, where the contractor, Regan, who was the principal in the bond, gave up the contract, and Krueger, Burne and Mullin, who were indemnitors of the surety, with the consent of all concerned, took up the completion of the work under the contract with the Government. The Chapin-Hall Lumber Company was under contract with Regan to furnish materials and labor and continued to furnish such materials and labor to Krueger, Burne and Mullin. In holding that materials and labor furnished to the latter were covered by the bond, the court said:

"Question is made whether this furnishing of materials and labor is covered by the bond. The statute required the obligation of the bond to be, and that of this bond is, that Regan should promptly make payment to all persons supplying him labor or materials for the prosecution of the work. The Chapin-Hall Lumber Company comes within the description. It supplied materials and labor for the prosecution of the work, under contract with him, to those who by agreement of all rightly stood in his place. This was supplying him, within the terms of the bond, and what was so supplied and not promptly paid for would be recoverable on the bond."

In *City Trust Safe Deposit & Surety Co. v. United States*, 147 Fed. 155, 160, O'Brien and Sheehan entered into a contract with the United States for the construction of a dry dock and gave a bond with the Surety Company as surety, provided as required by statute. In the prosecution of the work the principals associated with themselves two other persons, Perkins and McHale, the firm name remaining unchanged. The plaintiff for whose benefit the action was brought sold the coal to the firm consisting of four members. The Surety Company defended on the ground of the change in the parties to the contract. Upon this question the court says:

"We find no merit in the contention that the Surety Company is not liable for coal sold to O'Brien, Sheehan, Perkins & Hale, because the obligation of the bond covered payments by the firm of O'Brien & Sheehan to persons supplying labor and materials in the prosecution of the work provided for in the contract with the government. 'The practical effect of the statute is to confer a special lien in favor of such persons, and to substitute this bond in the place of the public building upon which that lien is charged. The bond is not, therefore, to be considered as if a special private offer of guaranty by the sureties to particular persons from whom their principal may solicit credit in the procurement of labor and materials, but as the performance of a precedent statutory condition of his contract, intended for the benefit of all persons whomsoever that, relying upon the provisions of the statute, shall have supplied him labor and material in its performance.' *Marble Co. v. Burgdorf*, 13 App. D. C. 506, 519."

The Court of Appeals of Missouri came to the same conclusion in *Board of Education v. United States Fidelity & Guaranty Co.*, 166 Mo. App. 410.

We give the facts and quote at length from this case because the facts were almost identical with those in the case at bar. In this case a partnership composed of Kohlbry and DeLaney entered into a contract with the Board of Education of the City of St. Louis for heating and ventilating plants for a city school and gave a bond conditioned in part that the principals "shall make payment to the parties furnishing the same for all materials used in the work provided for in the said contract and specifications hereunto annexed, * * * whether by sub-contract or otherwise." Shortly after entering into the contract and giving the bond, the partnership was dissolved and a corporation called Advance Engineering & Construction Company was formed and all of the business of the partnership was assumed by the corporation, the partners becoming stockholders in the new corporation. Johnson Heat Regulating Company entered into a contract with the corporation to furnish a steam and temperature regulation for the work, and not being paid in full, it commenced suit in the name of the Board of Education against the surety company on the bond. The surety company defended on the ground, among others, that the for use plaintiff was not a sub-contractor under the principals on the bond and that the surety was bound only for the acts of its principals. In holding that the corporation was in law and in fact a sub-contractor, the court said (pages 420, 421):

"Was the Advance Company a sub-contractor under Kohlbry and DeLaney, the original contractors? We have concluded that there is evidence tending to support the finding of the trial court that in fact and in law the Advance Company was a sub-contractor under the original

contract. It took over the work under and by contract with Kohlbry and DeLaney. It is true that no formal subletting appears, but all of its acts and of the Board of Education support the idea of a subletting and not an assignment of the contract. *The Board of Education recognized no assignment of the contract*, as it was necessary for it to do in writing by the terms of the contract, but made all the payments direct to the National Engineering & Construction Company. * * * No one undertook to make a new contract between the Board of Education and the Advance Company or the Board of Education and relator. All parties acted under the original contract. * * *

It is beyond question that the surety of a contractor is only liable to those who have done work or furnished material by contract under the original contract; that the liability of the surety extends only to those in privity by contract with the original contractor. While the privity of contract is necessary, it need not be directly with the original contract, but it must spring out of it. That it is not derived directly from the original contractor does not destroy the privity. It may come through contract with the sub-contractor, as in mechanics' lien cases it frequently does. The contract and the bond require the principal and surety to respond for claims for labor and material furnished under the contract, and whether that claim for labor and material comes directly from the original contractor or from a sub-contractor or from a laborer or material man under the sub-contractor, is immaterial so long as its origin is called for in the original contract and grows out of the original contract. Those are in privity of contract with the original contractor who do labor and furnish material for the sub-contractor under the original contract, provided that labor and material fall within the original contract. * * * (p. 427.) It is immaterial whether the material furnished and the work done was by

sub-contract—technically—or by agreement. The essential thing is that it was done under and within the terms of the original contract and not done by a mere volunteer.”

In *Freeman v. Berkey*, 45 Minn. 438, 440, the plaintiff contracted to furnish material to Murray & Folsom, who had entered into a contract with the City of Minneapolis for paving and curbing a certain street. Before the contract had been performed plaintiff learned that the firm of Murray & Folsom had been dissolved and that Folsom had assigned his interest in the agreement to Murray. The surety upon the bond, which was given under an ordinance of the City of Minneapolis and which provided for payment of all claims for work performed or material furnished, defended upon the ground that the material was not furnished to the principals, Murray & Folsom, but only to Murray. As to this defense, the court said:

“The stone was furnished under the contract with the firm, and applied upon the contract with the city. A change in the relations between the partners merely did not affect plaintiff, to whom both were bound by the contracts already made, and a delivery to one, and performance by one, would satisfy the terms of the contract as to both parties. As to the plaintiff and the city, Folsom’s obligation continued, irrespective of the dissolution.”

A similar situation arose in *Abbott v. Morrisette*, 46 Minn. 10, 11. Here Milsted & Belyea, partners, entered into a contract for the erection of a block of buildings and under the mechanics’ lien law of Minnesota, gave a bond conditioned as follows:

“Milsted & Belyea shall pay all just claims for all work done and to be done and all mate-

rials furnished and to be furnished pursuant to said contract and in the execution of the work therein provided for."

After the plaintiffs had furnished some building material to the partnership, Belyea assigned to Milsted all his interest in the construction contract. After the dissolution and assignment, the plaintiffs without knowing of the fact, sold to Milsted their material. The sureties on the bond contended that they were not liable for sales made to Milsted. We quote at length the court's opinion upon this question, because the reasoning seems particularly applicable to the facts in the case at bar:

"This defense cannot be sustained. The obligation of the principal obligors and of the sureties is not limited to debts contracted by such principal obligors, the original contractors. The bond is executed under and in pursuance of the statute, and is intended to have a wider scope and effect. It is to be read in connection with the statute. It takes the place of, becomes a substitute for, the statutory lien to which laborers and material men are entitled, in the absence of such a bond. The statute provides that, upon the execution and approval of such a bond, no lien shall attach to the property. Gen. St. 1878, c. 90, Sec. 3. The bond by its terms, as the law contemplates it should, embraces the undertaking that the contractors Milsted & Belyea should pay for labor and material furnished pursuant to the contract with the owner, and in the execution of the work therein provided for. That covers this case. The material sold by the plaintiffs was furnished pursuant to the contract for the constructing of this block of buildings, and in execution thereof, within the meaning of the statute, and of the bond when read in the light of the statute. *To show that it is not essential to the liability of these sureties that the principal obligors, Milsted & Belyea, should have both*

purchased the material for which a recovery is sought, we need only to call attention to the fact that those contractors might have sublet the whole contract, or any particular part of it, and yet unquestionably these sureties would have been responsible for material supplied to the sub-contractor, and used by him in performing the original contract, although Milsted & Belyea would not have been personally bound to the seller, unless by force of the bond. If the limited effect for which the appellants contend were given to the bond—if the withdrawal of one of several contractors, or an assignment by one of them or all of them, is effectual to discharge the sureties as to material or labor afterwards supplied in the performance of the original contract—the result would be either that such bonds afford very uncertain security to the landowner against liens of material men and laborers, or else that the latter class do not enjoy the protection which the statute professes to give them.”

Like conclusions were reached in the following cases:

Kaufman v. Cooper, 46 Neb. 644.

Leader Printing Co. v. Lowry, 9 Okla. 89.

Mundt v. Sheboygan and Fond du Lac R. R. Co., 31 Wis. 451.

In all of these cases it was contended that the liability was limited to material furnished the principal or principals in the bond, but the courts invariably came to the conclusion that the statute in question and similar statutes were intended to protect all persons furnishing labor or material for the work covered by the contract, and so far as we have been able to discover there is no contrary holding either in the Federal or state courts.

Before the Surety Company executed the bond this Court had already held that the United States were interested in the payment of labor and material furnished under such a contract and that the surety was necessarily contracting with reference to an uncertain liability. In this case the Surety Company entered into the contract with the Government long after the cases of *Guaranty Company v. Pressed Brick Company* and *Hill v. American Surety Company* had been decided by this Court and it knew that the statute would be liberally construed and that no privity of contract was necessary between the person furnishing the labor or materials and the principal contractor. The opinion in the Kenyon case, 204 U. S. 349, holding that the United States was a real party in interest in respect to the provisions of the bond for laborers and material men had been handed down a year and a half before the bond in question was executed. From the statute as construed by these decisions the Surety Company knew that it was contracting for an uncertain liability; that it would be liable for all the labor and materials which actually went into the work. It knew, too, that as to the Government there could be no assignment of the contract and that no transfer, whether by sub-contract or by assignment, would release it as to any liability to the Government.

(c) THE CASES UPON WHICH THE SURETY COMPANY RELIES EITHER INVOLVE THE RULES GOVERNING THE LIABILITY OF PERSONAL SURETIES OR DO NOT BEAR UPON THE QUESTIONS RAISED BY THE WRIT OF ERROR, WITH TWO EXCEPTIONS, ONE OF WHICH APPEARS TO BE AUTHORITY FOR THE CLAIMANTS AND THE OTHER OF WHICH HAS BEEN SO

DISTINGUISHED BY A LATER DECISION AS TO BE AUTHORITY FOR THE CLAIMANTS.

Upon the question of the effect of the assignment of the contract the cases cited by counsel for the Surety Company merely hold the general proposition that where the owner and contractor agree to a material change in the contract without knowledge of the surety the surety is released. Neither the cases nor the principle seem to apply to the facts in this case. Here there was no change in the contract. Schott was always liable and responsible to the Government for its performance. The Engineering Company was merely a sub-contractor, responsible to Schott and not to the Government. Schott was still liable under the statute, the contract, and the bond both to the Government and to laborers and material men.

In the District Court, in the Circuit Court of Appeals and again in this Court the plaintiff in error has relied upon *Hardaway v. National Surety Company*, 211 U. S. 552, cited at page 112 of its brief, and *Board of Education v. United States Fidelity & Guaranty Company*, 155 Mo. App. 109, cited at page 50 of its brief.

At the risk of trespassing upon the patience of the Court we shall discuss in some detail the opinions both of the Circuit Court of Appeals and of this Court in deciding the *Hardaway* case, for it is clear from a careful examination of the somewhat complicated facts involved, not only that this case is not authority for the Surety Company, but that it strongly supports the right of the claimants to recover.

Willard, Coyne & Cornwell contracted to construct a lock and dam for the government. After the work had been partly completed Willard and Cornwell assigned their interest in the contract to Coyne, who continued the work. Coyne becoming financially embarrassed contracted with Hardaway and Prowell for the completion of the work. They lost money on the contract and undertook to hold the surety upon the bond for this loss. The opinion of the Circuit Court of Appeals, which was written by Justice Lurton, is found in 150 Fed., 465. Hardaway and Powell's undertaking was as follows (211 U. S., 556):

"The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof, and to put in charge of said work a competent superintendent and to properly organize the work for an energetic prosecution thereof to completion."

The question before the court was thus stated by the Supreme Court at page 554:

"The question for consideration here is, under the circumstances of the case can Hardaway and Prowell recover upon the bond on their claim as for labor done and material furnished within the terms thereof?"

Both the Circuit Court of Appeals and the Supreme Court held that Hardaway & Prowell were not furnishing labor and materials within the meaning of the statute, but were mere money lenders and superintendents for Coyne. This is perfectly evident from the following quotations from the two opinions:

"The attitude of Hardaway & Prowell as

mere lenders of money is not, in substance, changed because that money was used in paying for labor and materials. Nor is the character of the claim, in its essence, changed by presenting it in the form of an account for the labor and materials which were procured by its application. Manifestly, if the money had been loaned to Coyne under the express agreement that he was to use it in supplying labor and materials to be used in this work, and it was so used, the debt would still be a debt for money advanced, and not a debt for labor and materials, though every dollar was so applied. The same result must follow if Hardaway & Prowell, as mere superintendents, or managers for Coyne, used the money advanced by them in paying for like supplies. In both hypotheses the labor and materials would be supplied by Coyne, although the money which paid for them had been advanced by the appellants. Would a bank lending money to Coyne to be used by him in carrying out this contract be entitled to the protection of such a contractor's bond simply because the money was to be used, and was, in fact, used, in paying for labor and materials which were used in the work? If not, how much stronger is the equity of appellants even if they themselves used the money in paying for labor and materials which went into the work, if, in so applying it, they were merely acting as the agents or superintendents of Coyne? *Money loaned would not be labor and materials. The labor hired and the persons actually supplying them with labor and materials might be protected as persons furnishing labor and materials to them as subcontractors, or as mere superintendents standing for and representing Coyne as a principal or subcontractor. But as mere agents for Coyne advancing money to him or for him, by paying for labor and materials supplied by others, they would not be subcontractors nor persons supplying subcontractors with labor and materials.*" (150 Fed. 470.)

"We are unable to see how that case controls the one at bar; nor can we reach the conclusion that Hardaway and Prowell were subcontractors furnishing labor or materials to the original contractor, or furnishing such labor or materials to subcontractors which enabled the original contract to be fulfilled, thereby bringing themselves within the principles of the Hill case. As we read this contract, Hardaway and Prowell, in view of Coyne's financial and other difficulties, undertook to do certain things in relation thereto. They undertook to superintend the completion of the lock and dam, and to that end to furnish the necessary finances for the completion of the work; for this they were to receive an agreed percentage upon the total cost upon the completion of the contract." (211 U. S. 559.)

Both courts concluded that Hardaway & Prowell could not recover for the further reasons that they had received all that Coyne had agreed to pay them, and that the surety did not agree that their contract would be profitable. This was expressed by the Court of Appeals as follows (p. 472):

"If they suffered unexpected losses, they must bear them. *The price for which they agreed to do the work has been paid them*, and they may not recover against the surety what they could not recover against the principal obligor."

From the language of the opinion of the Court of Appeals, it is perfectly clear that the surety urged the very defense that it is making in the present case, namely, that the assignment from Willard and Cornwell to Coyne so changed the terms of the contract that it released the surety. But the court said at page 466:

"As between the partners, we see no valid

objection to this agreement. It could not affect the United States, and was never intended to substitute Coyne for Willard, Cornwell and Coyne, and was effective only as an assumption by one of the firm of the debts of the firm in consideration of the receipt of the benefits to be derived from the execution of the agreement."

Furthermore, the Court of Appeals held that the surety was liable for all material delivered to Coyne, the assignee, saying (p. 469):

"Whether Coyne, after he had acquired the beneficial interest of his partners in the contract and assumed its burdens, is to be regarded as an original principal contractor or as a subcontractor, is of no practical importance. In either event persons who supplied him with labor and materials for the carrying on of the contract were within the protection of the bond, according to *Hill v. American Surety Company*. This the court below held, and all such claimants were given decrees against the bond. From these decrees the National Surety Company has not appealed. Neither does it make any difference in determining the liability of the bond to Hardaway & Prowell, whether we regard Coyne as an original or as a subcontractor. In either event, persons supplying him with labor and materials with which to execute the contract with the government would be within the intent of the bond."

In the other case relied upon by plaintiff in error, *Board of Education v. U. S. Fidelity & Guaranty Company*, 155 Mo. App. 109, Kohlbry and DeLaney, entered into a contract with the Board of Education of the City of St. Louis for heating and ventilating plants for a city school and gave a bond conditioned in part that the principals "shall make

payment to the parties furnishing the same for all materials used in the work provided for in the said contract and specifications hereunto annexed, * * * whether by sub-contract or otherwise." Shortly after entering into the contract and giving the bond, the partnership was dissolved and a corporation called Advance Engineering & Construction Company was formed and all of the business of the partnership was assumed by the corporation, the partners becoming stockholders in the new corporation. Thereafter the Advance Engineering & Construction Company became insolvent and the Philip Carey Company brought suit upon the bond for material and labor which it had furnished, and the court denied a recovery in this suit because no proof was made showing any privity of contract between Kohlbry and DeLaney and the Advance Engineering & Construction Company. In this case no proof was offered of the fact that the corporation had assumed the business of the partnership and so far as appeared the material was furnished to a mere volunteer.

Later another suit was commenced, upon the same bond and in the same court, by Johnson Heat Regulator Company, *Board of Education v. U. S. Fidelity & Guaranty Co.*, 166 Mo. App. 410. Here the court held the surety liable as the privity of contract between Kohlbry and DeLaney and the Advance Engineering & Construction Company had been proved, saying, page 422:

"It is beyond question that the surety of a contractor is only liable to those who have done work or furnished material by contract under the original contract; that the liability of the surety extends only to those in privity by con-

tract with the original contractor. While the privity of contract is necessary it need not be directly with the original contract, but it must spring out of it. That it is not derived directly from the original contractor does not destroy the privity."

On page 427:

"It is immaterial whether the material was furnished and the work done was by sub-contract technically or by agreement. The essential thing is that it was done under and within the terms of the original contract and not done by a mere volunteer."

From what we have said it must be clear that neither the *Hardaway* case nor the *Missouri* case tend to support the argument that the assignment of the contract as such released the surety company from its liability to laborers and material men who furnished material either to Schott personally or to the Engineering Company. Something more than a mere assignment of the contract was necessary to accomplish this.

In speaking of this branch of the case the Circuit Court of Appeals at page 573 of the record said:

"If in the instant case the Engineering Company were the claimant, the *Hardaway* case would be in point. Here, however, as in the *Hill* case, the claimants have supplied materials for the work pursuant to the contract whether they furnished them before or after the assignment. In our judgment there is no substantial difference in the legal relation and therefore none in the rights of material men dealing with a sub-contractor and those dealing with an assignee, if the assignment has not been sanctioned by the government. From the standpoint of the material men such an assignment is, in effect, but

a sub-letting; the original contract remains in full force; the original contractor is still responsible for the undertaking.

It follows, therefore, that all of the claimants who supplied material or labor for the work covered by the contract either to the original contractor or to the assignee and whether with or without knowledge of the assignment, were entitled to the full benefit of the bond, the statutory substitute for a lien, unless by some act of his own one or the other claimant may have released or waived or may be estopped from asserting his right."

II.

ESTOPPEL.

THE CLAIMANTS WERE NOT ESTOPPED FROM ENFORCING THE LIABILITY ON THE BOND (1) BY FILING CLAIMS AGAINST THE ESTATE IN BANKRUPTCY OF THE ENGINEERING COMPANY, (2) BY CONSENTING TO THE COMPLETION OF THE WORK BY THE RECEIVER OF THE ENGINEERING COMPANY, (3) BY DEALING WITH THE ENGINEERING COMPANY, (4) BY CONSENTING TO AND ADVISING THE SALE OF SCHOTT'S BUSINESS TO THE ENGINEERING COMPANY, (5) BY STATING AN ACCOUNT WITH THE ENGINEERING COMPANY, OR (6) BY ACCEPTING PART PAYMENT FROM THE ENGINEERING COMPANY.

The following facts were found relating to the above questions.

Three of the claimants, the Davis Company, Standard Underground Cable Company, and Universal Portland Cement Company, filed claims for all of the material which they had delivered either to Schott or to the Engineering Company against the

estates in bankruptcy both of Schott and the Engineering Company. Western Roofing & Supply Company and Racine Stone Company filed claims against the Engineering Company. Universal Portland Cement Company had furnished no material to the Engineering Company. (Rec., 516-532.)

After the Engineering Company and Schott had been thrown into bankruptcy the receiver of the Engineering Company sent out a circular letter to all of its creditors asking for advice as to whether or not it should complete the work called for by the contract in question. (Rec., 510.) So far as the records show none of the claimants replied to this letter with the exception of Western Roofing & Supply Company which recommended completion by the receiver.

Four of the claims, those of the Davis Company, Standard Underground Cable Company, Racine Stone Company and Roebling Construction Company, are based partly upon material furnished to Schott personally and partly upon material furnished to the Engineering Company. The claim of Universal Portland Cement Company is based only upon material furnished to Schott personally.

The Davis Company, through its president, acted as a member of the creditors' committee which participated in the sale of Schott's assets to the Engineering Company. It stated an account with the Engineering Company covering all of the material furnished both to the Engineering Company and to Schott personally and it accepted part payment of the entire account from the Engineering Company. (Rec., 503-510.)

Although the trial court found as facts the matters above stated, it held as a matter of law:

(a) That none of the claimants were estopped by anything they had done from recovering for the material furnished to Schott personally (Rec., 535);

(b) That the assignment from Schott to the Engineering Company released the surety as to all material delivered after January 2, 1909;

(c) That the above acts of the John Davis Company did not in any manner preclude it from claiming a liability against Schott or against the Surety Company, either by way of equitable estoppel, ratification or otherwise; but

(d) That the John Davis Company consented to and helped bring about the substitution of a new principal in the contract. (Rec., 533.)

(a) That none of the above matters constitute an estoppel is sufficiently shown by the opinion of this Court in *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 109, where the Court states that the general doctrine with proper limitations is well expressed in *Carr v. London & Northwestern Ry. Co.*, L. R., 10 C. P. 307, and quotes from this case as follows:

"If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist."

Substantially the same definitions are given in *Dickerson v. Colgrove*, 100 U. S. 578, 580, and in Bigelow on Law of Estoppel, Fourth Edition, page 552.

In none of the matters above mentioned did there exist any one of the elements of estoppel. There was no false representation or concealment of material facts. No statement was made with the intention that the Surety Company should act upon it, nor did the Surety Company act upon any statement of any one of the claimants. Nothing which any one of the claimants said or did caused the Surety Company to act to its prejudice.

(b) The Surety Company was not prejudiced by the fact that some of the claimants filed their claims against the estate of the Engineering Company. Any amount paid as dividends upon these claims would relieve the surety to the extent of such payments. There was nothing inconsistent in undertaking to hold both the Engineering Company and Schott personally. The Engineering Company was liable for all material which had been delivered to it, and Schott and the Surety Company were liable upon the bond for any material which went into the work and was not paid for.

The affidavits of claim filed in the bankruptcy estate of the Engineering Company stated only that the Engineering Company was indebted to the claimants and did not state that Schott was not indebted to them. Even if the latter statement had been made it would have amounted only to evidence and not to a judicial admission or an estoppel. Allegations made in one suit do not constitute an estoppel in a

suit between the party making the allegations and a stranger.

Mr. Wigmore, Vol. 2, Sec. 1065, in discussing bills and answers in chancery in other cases, under the heading of "Judicial Admissions," says:

"The moment we leave the sphere of the same cause, we leave behind all questions of judicial admissions. A judicial admission is a waiver of proof (*ante*, Sec. 1057); and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof on all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi-admissions, *i. e.*, ordinary statements, which now appear to tell against the party who then made them."

In *Blanks v. Klein*, 53 Fed. 436, 438, the Circuit Court of Appeals of the Fifth Circuit quotes from Wharton on Evidence, as follows:

"Pleadings of a party in one suit may be used in evidence against him in another, not as estoppel but as proof open to rebuttal and explanation, that he admitted certain facts."

To the same effect are:

Hunter v. Hunter, 31 L. R. A. 411 (Cal.).

Snydacker v. Brosse, 51 Ill. 357.

Quimby v. Carhart, 133 N. Y. 579.

Robrecht v. Marling, 29 W. Va. 765.

C., R. I. & P. Ry. Co. v. Mashore, 96 Pac. 630.

Title Guaranty & Surety Co. v. U. S., 187 Fed. 98.

There was no question of election of inconsistent remedies nor was the filing of such claims any evidence of a novation.

Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 721, 739.

(c) It is asserted that the claimants by dealing with the Engineering Company either by ratification or estoppel or because of a novation made it inequitable for them to recover from the Surety Company. This contention is made largely with reference to the Davis Company and we shall therefore discuss its claim in some detail. Much that is said, however, is applicable to the claims of the other for use defendants in error.

THE JOHN DAVIS COMPANY.

The Davis Company sold to Schott personally for use under the contract, before the sale of his business to the Engineering Company, material amounting to \$15,125.91. Later it sold to the Engineering Company material amounting to \$6,766.72. Certain amounts were paid on account, which, applied to the earlier items, left a balance of \$9,893.98, due for material delivered to Schott personally. (Rec., 514-515.)

The agreement between Schott and the Engineering Company provided that the Engineering Company should "assume a total liability in the way of accounts and bills payable on account of construction on hand, etc., in the amount of not to exceed the sum of \$50,000." (Rec., 507.) This clause in the agreement rendered the Engineering Company liable to Schott's creditors to the extent of \$50,000. Acting upon this, the Davis Company stated an account with the Engineering Company and later filed

a claim in the Engineering Company bankruptcy proceedings. A part of the wording of its claim, however, was as follows:

“That the consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special order and request, as shown by statements hereto attached, and partly by promissory notes hereto attached. The Schott Engineering Company assumed and agreed to pay the liabilities of W. H. Schott for said goods for a valuable consideration.” (Rec., 517.)

The Davis Company filed a claim covering the same material against W. H. Schott personally (Rec., 518), evidencing its intention to hold both the Engineering Company and Schott.

The trial court held that none of the acts of the Davis Company estopped it from asserting the liability of the Surety Company and held that it should recover for the material delivered to Schott personally, with interest from the date of the suit. (Rec., 533, 4.)

The Surety Company contends that the Davis Company should not recover both for the reasons given above, which apply to others of the claimants, and for the additional reason that its dealings with Schott and the Engineering Company were such that it is not in a position now to insist upon the liability either of Schott personally or of the surety upon the bond. This contention grows out of the following facts as found in the record, pages 503-514.

Some time prior to the execution of the contract for the construction of the Naval Training Station, Schott became financially involved and a committee of his creditors was formed. This committee con-

sisted of five members, representing, respectively, the American Radiator Company, the John Davis Company, United States Cast Iron Pipe and Foundry Company and two other companies. John D. Hibbard represented the Davis Company upon the committee. He was no more active than the other members. Conferences between Schott and this committee resulted in the organization of the Engineering Company, of which Schott became president and the members of the committee directors. From the time the government contract was executed to the organization of the Engineering Company, Schott conducted his business subject to the approval and practical control of this committee. After the formation of the company, the members of the committee constituted a majority of the Board of Directors. Each of them held one share of stock, but by a voting trust they were given the power to vote a majority of the common stock owned by Schott until the old debts were paid. Mr. Hibbard as a member of this committee approved this plan and helped to carry it out. As a director of the Engineering Company he voted to approve the purchase of Schott's business.

There is clearly nothing in the acts of Mr. Hibbard upon which an implied agreement could be based, by which the Davis Company consented to release either Schott or the surety from liability, nor do such acts amount to an estoppel. The Davis Company violated no duty it owed to the Surety Company, nor in any way misled or deceived it. Its counsel nowhere mentions any such duty, nor does he say anywhere that the Davis Company misled or deceived his client. His only complaint is, as he

repeatedly asserts, that the Davis Company substituted a new principal in the contract between Schott and the government.

In this connection he cites *United States v. American Bonding & Trust Co.*, 89 Fed. 925, where the plaintiff had made false statements to the surety with reference to the credit of the principal and later applied money received from the principal in the bond upon an old indebtedness, although the money was paid under the contract secured by the bond. But counsel refers to no acts of the Davis Company of the character described in this case, for the simple reason that there were none.

Counsel contends that the finding of the court below (Rec., 578), that the Davis Company "forced" a new principal into the contract, is binding upon this Court. There are two answers to this: First, this was not a finding of fact but a conclusion of law; second, if it can be called a finding of fact, there is no evidence whatever to sustain any such finding. Whether, under the facts here involved, there was any such substitution of principal in the government contract as to release the surety is the controlling question in the case. The court did find as a matter of fact what was done by each of the parties to the contract and to this cause; but whether what was done operated to substitute a new principal in such manner as to release the surety is purely a question of law.

The court found that the contract of sale in itself substituted a new principal in the government contract and thereby released the surety as to all persons furnishing material to the Engineering Com-

pany. Surely this was not a question of fact which the court might have left to the jury.

Then there was absolutely no basis for the finding that the Davis Company made such a substitution. It was not a party either to the government contract or to the contract by which Schott transferred his business to the Engineering Company. Its president was one of five members of a committee who recommended the transfer and was one of five directors who voted for it. Nor is there any evidence to indicate that the Davis Company intended to release Schott from his direct liability to it for material furnished before the transfer or from his prospective liability upon the bond, should it decide to sell material to the Engineering Company. Under all the authorities, it could sell material to the Engineering Company, accept part payment from it or file a claim against its estate without giving up its right to hold Schott.

Such release, if there was one, must have been either by contract or estoppel. We are unable to see that there was any false representation or any concealment of material facts on the part of Hibbard. If there were any, they have not been called to our attention.

The Davis Company was not a party to the agreement between Schott and the Engineering Company, and this agreement did not purport to relieve Schott from any liability to his creditors. It only provided that the Engineering Company would assume such liability. Such assumption, of course, was not inconsistent with the continued liability of Schott.

There was no obligation upon the Davis Company

or upon any of the other claimants to notify the Surety Company of the transfer of Schott's business or of the fact that they were selling material to the Engineering Company. This Court so held in *Mankin v. Ludowici-Celadon Co.*, 215 U. S. 533, 540.

Most of the questions involved in this case were presented to the Circuit Court of Appeals of the eighth circuit in *Anglo-American Land M. & A. Co. v. Lombard*, 132 Fed. 721, 739, where it was held, in an opinion by Justice Van Devanter, that the creditors of the Lombard Investment Company, a Kansas corporation, could enforce the liability of its stockholders notwithstanding the fact that they dealt with the Lombard Investment Company, a Missouri corporation, to which had been assigned all of the assets of the Kansas corporation, and which had agreed to assume the liabilities of the former company. The defendants, the stockholders of the assignor, defended upon the ground that the plaintiffs had accepted the benefits of the assignment, and with full knowledge of all the facts, had acquiesced in, consented to and affirmed the transfer. The plaintiffs had dealt with the assignee company, had established their claims against its property in the hands of a receiver and, had accepted dividends from the sale of its assets. Nevertheless, the court held that such conduct of the creditors did not prevent their recovering from the stockholders of the assignor, saying (page 738):

"Nor does it change the result that the Missouri Company agreed with the Kansas Company and its stockholders, in consideration of the transfer of the assets and stock, to pay all claims then existing or thereafter arising against the Kansas Company or any of its stockhold-

ers, and to save them harmless in the premises. That did not pay the corporate debts or discharge the stockholders from liability, nor did it substitute the Missouri Company in place of the Kansas Company as the debtor. Whether the Missouri Company could and would perform this agreement is a risk which was assumed by the Kansas Company and its stockholders, but not by its creditors. No possible arrangement among the Kansas Company, its stockholders, and the Missouri Company, made after they had wholly disabled the Kansas Company from paying its debts, or made in the immediate contemplation of so doing, could destroy or affect the right of the creditors of the Kansas Company to enforce their demands against its stockholders to the full extent of the liability imposed by law. There is no finding that the holders of the indebtedness here sued upon accepted the Missouri Company as a substituted debtor, or that they agreed to discharge or release the Kansas Company or its stockholders; nor can such an agreement be implied, as a matter of law, from the facts found, or any of them. True, the holders of these claims treated and dealt with the Missouri Company as having succeeded to the business of the Kansas Company, and as having agreed to discharge its debts and liabilities. They also established their claims in the receivership suit, and accepted dividends derived from a sale of the entire assets of the Missouri Company, a material portion of which was not obtained through the Kansas Company. But there is nothing in this which is inconsistent with a purpose and right to assert and enforce these claims against the Kansas Company and its stockholders. Indeed, in the receivership suit these claims were proved against both companies, and the fair legal inference from the proceedings is that they were allowed by the master and the court against both companies. A creditor who collects a portion of his claim from a third person, who after the debt is contracted

agrees with the debtor to pay it, does not thereby discharge the debtor, or become estopped from collecting the balance from a surety or guarantor. There is in this no election between inconsistent claims or remedies. The stockholders of the Kansas Company were benefited, not injured, by what was done by these creditors."

In this case a petition for a writ of *certiorari* was denied by this Court.

Lombard v. Anglo-American Land M. & A. Co., 196 U. S. 638.

If the assignment relieved Schott and the Surety Company from further liability upon the bond it was because there was a novation, but there were none of the elements of a novation in the transaction in question. That the facts of this case do not constitute a novation was held in two cases decided by the Circuit Court of Appeals of the Seventh Circuit.

In the first, *American Paper-Bag Co. v. Van Nortwick*, 52 Fed. 752, suit was brought upon a contract for royalties under a patent license. The contract was assigned by the licensees to the Western Paper-Bag Company, a corporation organized by the defendants. The defendants were officers and managers of the corporation. The machines covered by the contract were delivered to the corporation and used by it. The court, however, held that the defendants were liable, saying (p. 754):

"Indemnification is not substitution. Nor would the defendants be discharged—being otherwise liable—if the paper-bag company, by reason of the use of the machines, with knowledge of the terms of the contract and license, were also bound to respond to the plaintiff for the royalties here sought to be recovered. Addition is not substitution. In such case the one party is

bound by reason of contract stipulation; the other, if liable at all, upon equitable considerations for the use of another's property and protected right. Nor would it avail to a novation if the Western Paper-Bag Company had expressly agreed with the defendants to discharge their liability to the plaintiff. Assumption of liability is not novation unless there concur the consent of the creditor to accept the company in lieu of the defendants and a discharge of the latter."

That court came to the same conclusion in *Illinois Car & Equipment Co. v. Linstroth Wagon Co.*, 112 Fed. 737, where the Illinois Car & Equipment Company leased its business, including the contract in question, to the Southern Car & Foundry Company. The latter refused to take all the material covered by the contract and the suit was brought against the lessor for damages for breach of contract. It defended on the ground that there was a novation. In holding that the plaintiff had not released the liability of the defendant by dealing with the assignee, the court said (p. 740):

"There must be consent by the creditor to take the new debtor as his sole security and to extinguish the claim against the former debtor. *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741. Such consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor. Nor does payment by the Wagon Company to the Southern Company prove a novation. * * * Payment to the Southern Company does not prove consent by the Wagon Company to a discharge of the liability of the Car Company. There must be something more,—some evidence speaking an agreement between the original parties to the

contract to discharge the original obligor from liability and to accept the substitute."

In *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, it was held that a surety upon a lease remained liable notwithstanding the fact that the lessor had received rent from the assignee of the lease and accepted such assignee as tenant.

In *Harrington-Wiard Co. v. Blomstrom Mfg. Co.*, 166 Mich. 276, the Supreme Court of Michigan held the assignor of a contract liable for its performance, although the plaintiff rendered a complete statement to the assignee and accepted part payment from the assignee. It was claimed that the plaintiff had accepted the assignee, the Lyon Motor Car Company, in place of and had released the defendant from liability. After giving the elements of novation, the court stated that there was no novation first because the plaintiff was not a party to the contract of assignment, and second because there was no evidence that the plaintiff had agreed to accept the assignee in place of the assignor, saying further (p. 287):

"To constitute novation the creditor must have consented to the discharge of the original debtor and must have accepted the promise of the new debtor. * * *

Such consent, however, is not to be implied merely from the performance of the contract or the payment of money by the substitute, for that might well consist with the continued liability of the original party."

Plaintiff in error bases its argument that the conduct of the claimants has resulted in releasing the surety upon the premise that the condition of the bond for the benefit of laborers and materialmen is for their sole benefit and that the government is not

interested therein. While we deny the truth of this premise, it seems to us immaterial in connection with the argument which follows. No one will dispute the assertion that these claimants by proper contracts could have released Schott and his surety from liability to them and that their conduct might have been such as to estop them from enforcing such liability. The latter situation existed in *United States for use v. American Bonding Co.*, 89 Fed. 925, which we have referred to before.

Several cases are cited to the effect that any change of the contract discharges the surety. These cases merely hold the general proposition that where the owner and the contractor agree to a material change in the contract, without the knowledge of the surety, the surety is released. We have no fault to find with the cases or with the principle, but neither the cases nor the principle apply to the facts in this case. Here there was no change in the contract. Schott was always liable and responsible to the Government for its performance. The Engineering Company was merely a subcontractor responsible to Schott and not to the Government. Schott was still liable under the statute, the contract, and the bond both to the Government and to laborers and materialmen. No claim is made that any of the claimants agreed to release Schott from any liability for the material delivered to him.

Neither have we any criticism to make of the cases cited to sustain the proposition that the substitution of a new principle in a contract releases the surety. They are all to the effect that if the obligee consents to a release of the contractor, who is the principal in the bond, he cannot hold the surety. This, of

course, is elementary. *Todd v. School District*, 40 Mich. 294, cited on page 31 of counsel's main brief, illustrates this perfectly. Here the school district consented to the assignment of the contract and released the assignor, the principal in the bond. Of course, it could not expect to hold the sureties.

Furthermore, these claimants were not parties to the contract and bond in any such sense as the Government was a party thereto. Before the sale of Schott's business to the Engineering Company, each of them had sold certain material to him, personally, for which he was liable. With one exception these were executed contracts, not contracts for the delivery of material in the future. They were not contracts which could be sold by Schott to the Engineering Company. At the time of the sale they constituted only obligations upon Schott to pay the claimants certain sums of money. None of the claimants consented to a transfer of any of these contracts to the Engineering Company and none of them consented or agreed to release Schott from his personal liability to them.

Counsel for the Surety Company contends that these claimants accepted the benefits of the transfer of the contract to the Engineering Company and that by so doing they ratified the transfer; that such ratification operated to release Schott and the Surety Company.

The authorities cited in support of this contention are all based upon agency or partnership and the principles upon which they are founded are not subject to criticism. To make these cases apply, counsel assumes that the sale of Schott's business was

made for the benefit of the claimants in the sense that an agent makes an agreement for the benefit of his principal.

Under the authorities which we have cited the acts of the claimants were in no way inconsistent with their intention and right to look to the continued liability of Schott and his bondsman, in the event that the Engineering Company should fail to fulfill its agreement with Schott to protect him from all liability on the Government contract. Neither by filing their ~~claims~~ against the estate of the Engineering Company, by dealing with it, by stating an account with the Engineering Company nor by accepting part payment from it did they affect in any way their rights either against Schott or the Surety Company. Nothing which any of them did changed the liability of the surety from that provided for in the bond and contemplated by the statute. Under the bond and statute, both Schott and the surety remained liable for all work and material which went into the work called for by the contract.

The Circuit Court of Appeals held that none of the claimants had released or waived his rights or was estopped from enforcing them, saying, at page 573 of the record:

"2. On behalf of the Surety Company, it is urged that the bond must be dealt with as if several bonds had been given, one to the Government and one to each claimant for the sole protection of the obligee; that in this aspect, the assignment, even though invalid as to the United States, and the assent thereto by a claimant evidenced by accepting payment from the assignee on account of the entire claim or by filing the entire claim against the assignee's estate in bankruptcy, make such a material change in the

obligation guaranteed to such claimant as will release the surety from any liability to him.

While the argument as to the dual character of the bond is clearly sound, *Equitable Surety Co. v. McMillan*, 234 U. S. 448, 456, the conclusion sought to be drawn therefrom does not follow. The obligation guaranteed by the bond is not, as the contention implies, that Schott as purchaser will pay for goods sold to him by each of the assumed obligees but that he as the contractor (and as long as the assignment is not recognized by the Government, the only contractor), will pay for all goods furnished by the obligee pursuant to the only contract mentioned in the bond, that between Schott and the United States, regardless of whether Schott or his assignee carrying on the work in Schott's name or a subcontractor is primarily liable therefor as the actual purchaser thereof.

As a materialman's assent to the assignment could not vary this obligation, the principle contended for is entirely inapplicable.

3. A claimant could release or waive his rights under the bond in whole or in part, but as a mere assent to the assignment and to the assumption by the assignee of the assignor's obligations, while conferring rights on the claimant as against the assignee, would not amount to a novation (*Ill. Car. & Equipment Co. v. Linthroth Wagon Co.*, 112 Fed. 737), or operate to discharge the original debtor from his personal obligation, *a fortiori* it would not effectuate a release of a lien on property or a discharge of either the principal or surety in the statutory substitute therefor, the bond. It is not contended and, under the findings and the evidence, it could not be successfully urged that any claimant expressly released or waived his claim against Schott or the Surety Company.

4. The finding of the court that the Davis Company consented to and helped to bring about the substitution of a new principle in the contract and that the assignment contract forced

a new principle into the contract, while called a finding of fact, is in effect a conclusion of law, and one in which we cannot concur, inasmuch as without the Government's consent, no new principal could, as a matter of law, be forced into the only contract in question, that between Schott and the United States.

5. Neither the Davis Company nor any other creditor is estopped from asserting his rights against the Surety Company because, irrespective of all else, an element essential to an estoppel *in pais* is lacking; damage to the Surety Company. The findings and the evidence demonstrate that the creation of the corporation and the assignment to it of Schott's interests brought fresh capital into the enterprise and delayed the failure; that neither this nor the completion of the work by the receiver diminished the rights of or damaged the Surety Company; any payments made by and any dividends obtained from filing claims against the Engineering Company have reduced the liability of Schott and the Surety Company.

6. No question of election of inconsistent rights or remedies is involved. Under the bond, the principal and the surety are liable for labor and material furnished for the work pursuant to the contract; this does not exclude or limit any personal obligation of the contractor or the assignee or both, either directly, as debtor, for goods bought or by reason of the assumption of any such debt; moreover, the creditors far from electing to release Schott, very properly filed their claims against his estate in bankruptcy as well as against that of his assignee. They thereby asserted their intention to hold each of them, not their election to accept the assignee as their sole debtor. *Angle American Land M. & A. Co. v. Lombard*, 132 Fed. 721."

III. INTEREST.

THE CLAIMANTS ARE ENTITLED TO RECOVER INTEREST UPON THEIR CLAIMS THE AMOUNTS OF WHICH WERE LIQUIDATED AND UNDISPUTED FROM THE DATE OF THE COMMENCEMENT OF THIS ACTION AND DAMAGES WERE PROPERLY ASSESSED FOR THE AMOUNT OF SUCH INTEREST IN ADDITION TO THE PENALTY OF THE BOND.

The claims filed in this case largely exceed the amount of the bond. No question has ever been raised as to the amounts of these claims. They were all liquidated or could have been by mere computation. The Surety Company has resisted payment not because it complained of the amounts of any of the claims, but because it denied any liability upon the bond.

Under these circumstances The Surety Company was clearly liable for interest from the time it received notice of the default of Schott. As no such notice was proved the court held that the Surety Company was liable for interest from the date of the commencement of the suit.

This Court has held that the question of liability for interest is to be determined by the laws of the state where the contract was to be performed. The bond involved in this case was given by an Illinois Surety Company and the work called for by the contract was performed in the State of Illinois. (Rec., 502.)

Scotland County v. Hill, 132 U. S. 107, 117.
United States v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 530.

Section 2 of Chap. 74, Revised Statutes of Illinois, 1913, p. 1488, provides in part as follows:

“Creditors shall be allowed to receive at the rate of five per centum per annum for all moneys after they become due on any bond,” etc.

Under this section the Supreme Court of Illinois, in *Holmes v. Standard Oil Co.*, 183 Ill. 70, held that a surety upon a penal bond was liable for an amount in excess of the penalty of the bond by way of interest from the date when the liability upon the bond accrued, saying (p. 73):

“Conceding, without deciding, the appellant’s testatrix should be regarded as a surety, the general rule the liability of a surety on a penal bond cannot be extended beyond the amount specified as the penalty of the bond was not infringed in this instance by the rendition of judgment in an amount, by way of interest, in excess of the penalty of the bond.”

Further on, the court, speaking of the rule that the amount of recovery should be limited to the penalty of the bond, says (p. 74):

“The rule cannot be further invoked to relieve against the payment of interest awarded by the statute as compensation for delay in making payment of the amount so reduced under the operation of the rule.”

In the early case of *Ives v. The Merchants Bank of Boston*, 12 How. 159, this Court allowed interest in excess of the penalty of the bond. There you said that in cases where unascertained damages are claimed it is the proper rule to limit the recovery to the penalty of the bond, but as the amount of the damages were liquidated, you said further (p. 165):

“The moderate rule has been applied to requiring interest from the time that demand of

payment was made by suit; a rule now so generally established in similar cases by state courts of high authority that this Court could not violate it without manifest impropriety."

Again, in *United States v. Curtis*, 100 U. S. 119, the court said:

"We are, therefore, of opinion that the earliest moment at which any one became liable on account of the breach of the condition of the bond now sued on was the service of the writ on the defendants, and that such service was a sufficient demand. The court properly allowed interest on that basis."

That the amount of the judgment should not be limited to the penalty of the bond appears from *United States v. McMullen*, 222 U. S. 460, where the judgment exceeded the amount of the penalty of the bond by some \$3,000 (pp. 467-8).

This subject was discussed at some length in *United States v. U. S. Fidelity & Guaranty Co.*, 236 U. S. 512, 528-531, but in this case, because of the failure to preserve the question properly, you considered only whether the United States was entitled to interest upon the penal sum of the bond from the time of the principal's default in the absence of notice of the default given to the surety or any demand made upon it. From what was there said it would seem that you would have allowed interest in excess of the penalty of the bond from the date of the commencement of the suit if the question had been properly presented. In the opinion reference is made to *United States v. Quinn*, 122 Fed. 65, where the Circuit Court of Appeals of the Second Circuit stated

with reference to a bond given to secure a construction contract:

“Were the question properly before us we should be inclined to hold that interest can only be recovered from the date of the commencement of the action, the record failing to show a previous demand or notice.”

The court says further that the following quotation from 1 American Leading Cases 507, is the set rule in the Federal Courts:

“Yet it is to be understood that, in general, interest, as against the surety, begins to run on the penalty, and on the debt if less than the penalty, only from the time of a demand upon the surety or notice to him, *in pais*, or by suit, or something equivalent to a demand or notice.”

To the same effect are the decisions of many state courts.

In *Bank of Brighton v. Smith*, 12 Allen 243, the Supreme Court of Massachusetts says (p. 252):

“Where interest is not stipulated for as part of the contract, it is given by way of damages for the detention of the money. If the surety becomes charged by the default of the principal for the amount of the penalty or any portion of it, it is his duty to pay the same on demand; and if he neglects or refuses, the general principle above stated applies, and the interest is added by way of damages for his own default, not as enlarging in any degree his liability for the misconduct of the principal.”

The following is from *Clark, Guardian, v. Wilkinson*, 59 Wis. 543, 553:

“The only question is, can the obligee in a penal bond recover in an action against the surety any amount beyond the penalty? We think the authorities in this country establish the doctrine that when the damages resulting

from the breach or breaches of the bond exceed the penalty, interest on the amount of the penalty may be recovered from the time of the breach in excess of the penalty."

In *Long's Adm'r v. Long*, 16 N. J. Eq. 59, the court said (p. 67):

"I think both upon principle and upon authority, the plaintiff, in an action upon a penal bond with condition for the payment of money only, is entitled to recover the full amount of the penalty as a debt, and the excess of interest beyond the penalty, in the shape of damages for the detention of the debt."

This conclusion was followed by the Supreme Court of New Jersey in *Gloucester City v. Eschbach*, 54 N. J. L. 150, 155.

The principle of the above cases was stated as follows in *Wyman v. Robinson*, 73 Me. 384, 387:

"After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule, common to contracts generally, applies, that where money is due and there is a default in payment interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs."

That there is little, if any, division of opinion upon this question appears from the cases collected in a note in Book 55, L. R. A., p. 384.

Brandt in his *Work on Suretyship and Guaranty*,

2d Ed., page 163, after quoting from *Brainard v. Jones*, 18 N. Y. 35, in part as follows,

“The question in short is not, what is the measure of a surety’s liability under a penal bond, but what does the law exact of him for an unjust delay in payment after his liability is ascertained and the debt is actually due from him?”

says:

“The surety’s liability for interest accrues either after proper demand on the principal and his refusal to pay or from the commencement of the suit, in which latter case interest accrues from the date of service.”

At page 115 of its brief plaintiff in error, in discussing the question of interest, makes but one point, namely, that the demands of the claimants were not liquidated. In support of its contention it cites but one case: *Dady v. Condit*, 209 Ill. 488. This suit was for damages for failure to perform a contract for the conveyance of real estate and the damages were of course unliquidated. From no point of view does it bear upon this case.

Upon page 116 of its brief plaintiff in error calls attention to the fact, that the claims of nine of the defendants in error were dismissed by the Circuit Court of Appeals. All of these claims were dismissed because they were unwilling to join in the writ of error from the District Court to the Circuit Court of Appeals. In covering the entire case it was necessary for the Circuit Court of Appeals to enter a judgment for costs in favor of the Surety Company as against these claimants. None of these claims involved any peculiar question nor was the amount of any of them in dispute but as we have said, they

were dismissed solely because these claimants were unwilling to bear the expense of prosecuting the writ of error from the District Court to the Circuit Court of Appeals.

The District Court held that the Surety Company was liable for interest upon the claims for material delivered to Schott personally for the reason that such claims were liquidated. (Rec., 534.)

"The Surety Company is liable for interest as stated in the preceding conclusion, for the reason that the sums of money for which it was liable were definite and certain, although the question of its liability was uncertain."

Upon this question the Circuit Court of Appeals said (Rec., 576):

"We agree, however, with the ruling of the trial court that, as the amount of the claims was liquidated and undisputed, the controversy being confined to the question of the liability for the whole or a definite part thereof, interest was properly allowed from the commencement of the suit.

The principal of the bond, however, is not the measure of the liability thereof; failure of the surety to discharge its obligation thereunder, after proper demand or commencement of suit, subjects it to the payment of interest. Under Illinois Revised Statutes, Ch. 74, Sec. 2, as construed in *Holmes v. Standard Oil Co.*, 183 Ill. 70, this is at the rate of five per cent. per annum from the commencement of the suit."

If this court affirms the opinion of the Circuit Court of Appeals and holds the Surety Company liable for claims exceeding in amount the penalty of the bond, then it will be evident that the Surety Company should have paid into court at once upon the commencement of the suit the amount of the

penalty of the bond. It was legally liable for the full amount of the bond, but instead of discharging such liability it chose to set up various defenses, which it contended relieved it from such liability.

Upon the failure of those defenses it should properly reimburse the claimants for the damage which they have suffered by reason of the delay and pay to them the interest provided for by the statutes of Illinois.

IV.

RENTAL.

RENTAL DUE FOR CARS, TRACK AND OTHER EQUIPMENT
FURNISHED TO THE CONTRACTOR IS PROTECTED BY THE
STATUTE AND THE BOND.

The United States Equipment Company in September, 1908, entered into an agreement with W. H. Schott, whereby it was to furnish cars, track and equipment for his use at the Naval Training Station in carrying out his contract with the Government for a rental of \$42.82 per month and the expense of loading the plant and freight thereon to and from the Naval Training Station. The cars, track and equipment were accordingly furnished in the month of September, 1908, and were used in the prosecution of the work under Schott's contract with the Government until the end of October, 1909, such use being the hauling of materials upon and about the grounds where the construction work was in progress. The equipment was used by Schott until January, 1909, and thereafter by the Engineering Company. When the work was completed the equipment was returned to the Equipment Company. The charges for loading and freight to the Naval Training Station were

paid, as was also the monthly rental to and including the month of June, 1909. The rentals thereafter, in 1909, amounting to \$171.28, with return freight \$21.11, a total of \$192.39, were not paid. (Rec., 527.)

As in the case of the Racine Stone Company, where a contract was made for the supply of all crushed stone to Schott, and the trial court allowed the claim for stone furnished in 1909, so it was the view of the trial court that the Equipment Company, as it had made its contract with Schott in 1908, and the performance thereof had simply continued in 1909, without any new arrangements, could recover ordinarily, but the court took the view that the rentals and freight were not labor or materials of such kind and character as to afford a recovery under the bond and statute, and so held by conclusion of law No. 12. (Rec., 534.)

It is pointed out, in *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717, that Congress, in enacting requirements for bonds on public works, no doubt had in mind statutes of various states providing for mechanic's liens, but that nevertheless the former do not have the same aspect as the ordinary lien statutes. Circuit Judge Putnam said at page 719:

"Such statutes commonly use expressions of this character: 'Whoever performs labor or furnishes materials in erecting, altering, or repairing a house, building or appurtenances,'—a form which has direct reference only to the labor or materials and the erection in which they are used; while in the statute under discussion the expression is broader, namely, 'in the prosecution of the work.' The underlying equity of

the lien statutes relates to a direct addition to the substance of the subject matter of the building, or other thing, to which the lien attaches, while the statute in question concerns every approximate relation of the contractor to that which he has contracted to do. Plainly, the act of Congress and the bond in the case at bar are susceptible of a more liberal construction than the lien statutes referred to, and they should receive it."

Reference is then made (p. 721) to the underlying principle of discrimination to be observed between labor and materials consumed in the work or in connection therewith, and labor and materials made use of in furnishing the so-called contractor's plant, and available not only for the present, but for other work. The court then further said:

"It has, however, no necessary relation to repairs of an incidental and comparatively inexpensive character, made on the plant during the progress of the work, representing only the ordinary wear and tear or the equivalent thereof. Such repairs, under some circumstances, are within the purview of the statute, and are not always excluded by any rules of construction which we must apply to it."

The court then allows the claim of one of the parties for sundry repairs to the contractor's plant. (P. 722.)

The case of *Title Guaranty & Trust Co. v. Puget Sound Engine Works*, 163 Fed. 168; affirmed 219 U. S. 24, involved a bond given the United States for construction of a steam vessel, and included a decision of the question whether patterns made for the contractor from which to make castings required for the vessel fell within the provisions of the act and

bond. The Circuit Court of Appeals, Ninth Circuit, said (p. 179):

“The claims of the Allmond Company and the Puget Sound Pattern Works were for patterns furnished to the moulding department of the Puget Sound Engine Works. The patterns were used for the castings which went into the vessel. Why should not those who furnished the patterns be protected as are those who erect the scaffolding upon which the carpenters stand in doing their work upon the actual construction of the ship? We believe they should be.”

The Circuit Court of Appeals, Second Circuit, in *City Trust Safety Deposit & Surety Co. v. United States, to use of Bryant et al.*, 147 Fed. 155, held that the bond under the act of 1894 protects one who supplies coal to the contractor, which is used to operate hoisting or pumping engines employed in the work.

The decisions in *American Surety Co. v. Lawrenceville Cement Co.* and *Title Guaranty & Trust Co. v. Puget Sound Engine Works*, *supra*, as well as other cases, show and hold that trucking and water-carriage from sources of supply, stations and landings to the locality of the work,—not transportation, especially for considerable distances, by ordinary lines of steam, sail or rail common carriers,—come within the words of the statute, “furnishing labor or materials.” And without question trucking and hauling about the premises where the construction work is done come within the words.

The principles announced in the foregoing authorities support the claim of the United States Equipment Company. Had the Equipment Company by agreement furnished both the equipment and a

foreman and men to operate it at a price to cover both, no question would be made that the services would fall under protection of the bond for both. That the equipment alone was furnished does not alter the application of the principle. The equipment was a labor-saving device, and the value and use fall under the idea if not the strict term, labor. Calling the amounts or price to be paid for use of the equipment "rental," is, of course, immaterial. The equipment furnished was the subject of wear and tear and decrease in value, and some of it might be entirely worn out. Its use thus may partake of the nature of materials furnished. As pointed out in the *Lawrenceville Cement Co. case*, above cited, materials consumed in the work or in connection therewith are within the protection of such bonds, though not always the subject of mechanics' lien in cases of private contracts.

The equipment was not a purchase by Schott, to be retained by him for other and future work, but was furnished him for use in carrying materials about the grounds, to assist him in the construction work, and to be returned by him to the Equipment Company, which was done. For this beneficial use, and covering the wear and tear, a reasonable consideration was to be paid. The amount in the present case is small, but it is important to the Equipment Company and others who often furnish most expensive and valuable labor-saving machinery on public works. The distinction between the use granted and a sale in such cases is to be recognized and allowed, as is also the subject of comment in the *Lawrenceville Cement Co. case*, at page 721.

The Circuit Court of Appeals at page 576 of the Record held that the claim of the Equipment Company should be allowed.

CONCLUSION.

First. We contend that the statute under consideration contemplates that all persons furnishing labor and materials for Government work shall be protected by the bond. This security takes the place of that furnished by the customary mechanics' lien statute. Congress substituted the bond for the building. In every case where the Act has come before the higher courts for construction, it has been construed liberally to produce this result. In *Guaranty Co. v. Pressed Brick Co.*, this Court decided that an extension of time did not release the surety. In the *Hill case* it extended the security to those sub-contractors who furnished material to a sub-contractor and who had no contractual relationship with the contractor. In this case the court said:

“Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work.”

The fact that the surety did not know of the transfer of Schott's business was not material. As was said in the *Hill case*, the surety contracted for an uncertain liability. It did not know and could not know who was to furnish the labor and materials. Before the bond was executed this Court had already said that the language of the Act “looks to the protection of those who supply the labor or materials provided for in the contract *and not to the particu-*

lar contract or engagement under which the labor or materials were supplied."

The Kenyon case had decided that the Government was directly interested in the payment of those furnishing labor and materials. It was provided by statute that as to the United States there could be no assignment of the contract. The transfer from Schott to the Engineering Company then, was not technically an assignment. No act of Schott could relieve him and his surety from their undertaking with the Government to see that labor and materials going into the work were paid for. And those dealing with Schott and with the Engineering Company had a right to assume that this was the law.

Nor can the Surety Company successfully contend that it was in any way injured by the transfer of Schott's business. There was no change in substance but only a change in form and the net result of the transaction was the addition of thirty-six thousand dollars to the capital employed in his business.

Second. No authority has been called to our attention supporting the contention that any of the claimants who filed claims against the estate of the Engineering Company are estopped thereby from asserting the liability of Schott and his surety. On the contrary, all of the cases which we have found state that such conduct is entirely consistent with an intention to hold Schott and consequently his surety.

There is no evidence that any of the larger claimants consented to the completion of the work by the receiver of the Engineering Company, and the court so finds. But again, so far as we have been able to

discover, there is no authority nor any good argument to the effect that such conduct amounts to an estoppel.

The Davis Company is accused of many offenses against the Surety Company but none of them contain the elements of an estoppel; nor do the facts found constitute a novation. Mr. Hibbard, the president of the Company, with representatives of other creditors as a committee, undertook to work out the payment of their indebtedness. There is no evidence in the record that Mr. Hibbard did anything more than any of the other members of this committee. The committee and Schott decided upon the organization of the Engineering Company and the transfer of his business to it. After the organization of the company, Mr. Hibbard and the other members of the committee acted as directors of the company for a short time. So far as appears from the evidence, all of this was for the best interest of Schott's business. As has been said before, it certainly did not increase the liability of the Surety Company. There was nothing nefarious or underhanded about it, no offense against the Surety Company. In dealing with the Engineering Company the Davis Company was in exactly the same position as those of the other creditors who knew that Schott's business had been transferred to the Engineering Company.

We have satisfactorily shown, we believe, that by adjusting its accounts with the Engineering Company and by accepting part payment from the Engineering Company, the Davis Company was not prevented from holding Schott and the Surety Company either because of an estoppel or of a novation.

Third. The demands of the claimants were liquidated and properly drew interest as against Schott and as against the Surety Company from the time of notice to it of the default. Under the Statutes of Illinois as construed by its Supreme Court, and under all the authorities which we have been able to discover, both federal and state, the Surety Company is liable for interest in addition to the penalty of the bond.

Fourth. While it is true that ordinary equipment which can be used in performing other contracts does not come within the contemplation of the Act, yet rental for heavy equipment during the period of its actual use in performing the contract is in a different class and the court properly entered judgment in favor of the claim of the United States Equipment Company.

We respectfully ask therefore that this Court affirm the judgment entered by the Circuit Court of Appeals by which the Surety Company is held liable to the extent of the penalty of the bond and interest thereon from the date of the commencement of the suit for all of the demands of the claimants, both for the labor and material furnished to Schott personally and for that furnished to the Engineering Company.

Respectfully submitted,

WILLIAM D. MCKENZIE,

NEWTON WYETH,

WORTH ALLEN,

ROBERT J. CARY,

F. HAROLD SCHMITT,

*Counsel for the United States
of America, etc.*





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MAR 1 1917

JAMES D. MAHER

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1916.

No. 235.

ILLINOIS SURETY COMPANY,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA, for the use,
etc., of The John Davis Company, Emma E. Bair-
stow, George E. Bairstow, and Jessie B. Black-
mer, Executors, etc., et al.,
Defendant in Error.

Brief for Western Roofing & Supply Company.
(One of the Use-Defendants in Error.)

WORTH ALLEN,
*Attorney for Western Roofing
& Supply Company.*

CHARLES S. HOLT,
Of Counsel.



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Brief for Western Roofing & Supply Company.
(One of the Use-Defendants in Error.)

STATEMENT OF CASE.

A brief has been filed herein by a number of ma-
terial men, including Western Roofing & Supply
Company, which is one of the use-defendants in
error, in which questions which arise with reference
to all of their claims are argued. The claim of
Western Roofing & Supply Company, however, being
in a somewhat different and more advantageous po-
sition than that of most of the other claims, it was

thought advisable to deal with the questions peculiar to this claim in a separate brief. We shall not attempt to state in this brief the general facts which may be found in the other brief.

Some time during the summer or early fall of the year 1908 (Tr. of Rec. 519), W. H. Schott, a contractor, hereinafter called "Schott," entered into a written contract with Western Roofing & Supply Company, hereinafter called the "Supply Company," by which the latter was to furnish and the former was to take certain amounts of pipe covering materials. The materials were to be used at Lake Bluff, North Chicago, Illinois, in the performance of the contract which Schott had entered into with the United States on July 30 of the same year (Tr. of Rec. 106). For the faithful performance of the government contract, Schott, as principal, and Illinois Surety Company, hereinafter referred to as the "Surety Company," as surety, executed on August 3 (Tr. of Rec. 105) of the same year a bond to the United States of America, for the protection of the latter and the materialmen and laborers, all of which will more fully appear in the other brief filed herein. The understanding of both Schott and the Supply Company was that the Supply Company would not immediately ship to North Chicago the several carloads of materials called for by the contract, but that orders, or requisitions, would be sent to the Supply Company from time to time as the pipes were installed and the work progressed (Tr. of Rec. 519-520).

On the 2nd day of January, 1909, Schott assigned his interest in the contract with the United States to the Schott Engineering Company, a corporation, hereinafter referred to as the "Engineering Company," which was organized on that day. Schott's assignment proposal, which was accepted by the corporation, contained these words: "In reference to any of these contracts where the usual course of assignment might cause any discrepancies, as a matter of convenience to you, it is agreeable for the same to be carried through in my name" (Tr. of Rec. 506-508).

The Supply Company was not informed by Schott, or the Engineering Company, that the contract with the government had been assigned, nor did the Supply Company receive any information from any source concerning this fact until all the goods, for the payment of which claim is made in this suit, had been delivered (Tr. of Rec. 468-469). There is no evidence in the record that Schott's contract with the Supply Company was ever assigned to the Engineering Company, or that the Engineering Company assumed the responsibility for this particular contract.

The first requisition applying on the said contract with Schott was sent by Schott to the Supply Company in August, 1908 (Tr. of Rec. 520). The materials ordered in said requisition were shipped in February, 1909 (Tr. of Rec. 430). All of the requisitions sent in during the year 1909 bore the printed name and signature "The Schott Engineering Company." It appears that all of the requisitions, ex-

cept two, contained the following words and erasure: "Please ship (not "deliver") to ~~W. H. Schott~~ ~~Eng.~~ W. H. Schott" (Tr. of Rec. 440-450). "The Supply Company received during the year 1909 a number of letters concerning the materials covered by the aforesaid contract, some of the letters being on letterheads bearing the name and signature of the Engineering Company, others being on letterheads bearing the name and signature of W. H. Schott" (Tr. of Rec. 523).

Some of the invoices of 1909 contained the words: "Sold to The Schott Engineering Company. Ship to W. H. Schott." Others contained the words: "Sold to The Schott Engineering Company. Ship to same" (Tr. of Rec. 453-464). Three of the bills of lading contained the words: "Consigned to W. H. Schott." Two contained the words: "Consigned to W. H. Schott Engineering Company." Another contained the words: "Consigned to Schott Engineering Company (Tr. of Rec. 465).

The prices charged in the contract secured from Schott in the late summer or early fall of 1908 are not the prices which the Supply Company ordinarily got for such goods (Tr. of Rec. 467).

Proof of claim in the amount of \$4,873.41 was filed by the Supply Company against the bankrupt estate of W. H. Schott (Tr. of Rec. 498).

The findings of fact by the trial judge concerning the claims of Western Roofing and Supply Company are found in the transcript of record on pages 519-524.

The finding of fact by the trial court, "that said Supply Company dealt only with the Schott Engineering Company in making the sales or deliveries for which claim is made in this suit" (Tr. of Rec. 524) was excepted to as follows:

"(a) Said finding is not sustained by the evidence.

(b) Said finding is not a finding of fact but a conclusion of law.

(c) Said finding is contrary to law" (Tr. of Rec. 542).

The conclusions of law of said court relating to the claim of Western Roofing and Supply Company are found on pages 533-534 of the transcript of record. The conclusion that "The Supply Company ratified and confirmed the assignment of contract" was excepted to as follows:

"(a) The finding is contrary to law.

(b) The finding is not supported by the facts found or the evidence in the case.

(c) The Supply Company never knew of the assignment until after the materials in question had all been furnished" (Tr. of Rec. 543).

The finding that "The Western Roofing & Supply Company had a contract with Schott for future deliveries to him, but never made any such delivery of material except one, which was paid for, the others having been made to the Engineering Company, and the Surety Company is not liable therefor. Said Supply Company dealt only with the Engineering Company in making the sales or deliveries for which claim is made in this suit," was excepted to as follows:

"(a) Said finding is contrary to law.

(b) Said finding is not supported by the facts as found or by the evidence in the case.

(c) Delivery to an assignee, if with the consent and procurement of the assignor, as was the fact in this case, is delivery to the assignor.

(d) Schott, and therefore the Surety Company, is liable for such deliveries unless the Supply Company agreed to release Schott and look solely to the Engineering Company" (Tr. of Rec. 533-34, 544).

The assignments of error to the trial court's conclusions of law, so far as they relate to the matters argued in this brief, are as follows:

"9. The court erred in finding in paragraph 18 (a) of its findings that the Western Roofing & Supply Company dealt only with the Schott Engineering Company in making the sales or deliveries for which claim is made in this suit" (Tr. of Rec. 76).

"13. The court erred in holding in the seventh conclusion of law that the Western Roofing & Supply Company ratified and confirmed the assignment of contract from Schott to the Schott Engineering Company" (Tr. of Rec. 76).

"16. The court erred in holding in the eleventh conclusion of law that the Western Roofing & Supply Company made but one delivery to Schott, and that the Surety Company is not liable therefor, and that said Supply Company dealt only with the Engineering Company in making the sales or deliveries for which claim is made in this suit" (Tr. of Rec. 77).

The other brief filed herein by the use-defendants in error takes up the general question, among others, whether a corporation executing a bond of this kind as surety for X is liable to A who furnished materials to Y, X's assignee, under a contract made with Y after the assignment. Of course if the surety corporation is liable to A, it would, *a fortiori*, be liable

to contractor B, whose contract was not with Y, the assignee, but with X, the surety's principal. But if we should assume, for the sake of argument, that this Court should hold that the surety is not liable for goods delivered to Y, the assignee, under a contract with Y, there remains to be answered the question which arises with reference to the claim of the Supply Company, namely, whether the surety is liable for goods delivered to Y, the assignee, under a contract with X, such goods being delivered with the consent and procurement of X and without any knowledge on the part of A that X had been succeeded by a corporation called The X Engineering Company.

The question for the Court's determination is not with whom the Supply Company "dealt," or to whom it delivered the goods, which had been contracted for by Schott before the corporation was organized. The question is, whether the Supply Company, which had a contract with Schott, which contract was secured by the bond executed by the Surety Company, has delivered the goods as directed by the principal and for the purpose contemplated in the contract and bond, and if such delivery has been made, whether it (the Supply Company) has done any acts by which it gave up the principal as its debtor and agreed to look solely to the principal's assignee, the Engineering Company.

BRIEF.

I.

THE MATERIALS IN QUESTION WERE FURNISHED UNDER
AND IN ACCORDANCE WITH A WRITTEN CONTRACT MADE
IN 1908 WITH W. H. SCHOTT.

II.

UNLESS THERE WAS A NOVATION, SCHOTT AND HIS
SURETY ARE LIABLE FOR GOODS FURNISHED "BY THE
PROCUREMENT OR CONSENT" OF SCHOTT.

American Paper Bag Co. v. Van Nortwick,
52 Fed. 752.

Bigelow on Law of Estoppel, 4th Ed. 552.

III.

THERE WAS NO NOVATION.

A.

The Supply Company did not know at the time
the goods were being furnished that a corporation
had succeeded Schott.

Owen v. Shepard, 59 Fed. 746.

Guckert v. Hacke, 159 Pa. St. 303.

N. Y. Nat. Ex. Bk. v. Crowell, 177 Pa. St.
313.

Clark v. Jones & Bro., 87 Ala. 474.

Tobias v. Wierck, 48 N. Y. Supp. 146.

Cornwell v. Megins, 39 Minn. 407.

B.

There was no agreement by the Supply Company to give up Schott and his surety as its debtors and look solely to the assignor of Schott's government contract.

American Paper Bag Co. v. Van Nortwick,
52 Fed. 752.

*Ill. Car & Equip. Co. v. Linstroth Wagon
Co.*, 112 Fed. 737.

*Anglo-American Land M. & A. Co. v. Lom-
bard*, 132 Fed. 721.

Mowry v. Farmers Loan & Tr. Co., 76 Fed.
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Harrington-Wiard Co. v. Blomstrom Co.,
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29 Cyc. 1132-1133.

21 Amer. & Eng. Ency. of Law, 2d Ed. 666.

Netterstrom v. Gallistel, 110 Ill. App. 352.

Black v. DeCamp, 78 Iowa 718.

Philadelphia v. H. C. Nichols Co., 214 Pa.
265.

Kaufman v. Cooper, 46 Nebr. 644.

Freeman v. Berkey, 45 Minn. 438.

Abbott v. Morrisette, 46 Minn. 10.

ARGUMENT.

I.

THE MATERIALS IN QUESTION WERE FURNISHED UNDER AND IN ACCORDANCE WITH A CONTRACT MADE IN 1908 WITH W. H. SCHOTT.

There is one fact found by the trial court (Tr. of Rec. 519) which stands out in the record clearly and indisputably, viz., that the contract, under which the materials were furnished by the Supply Company, ~~was~~ entered into between the Supply Company and W. H. Schott individually in the late summer or early fall of 1908, several months before the corporation which succeeded Schott was organized. Nor can there be any dispute concerning the further fact stated by the trial court in these words:

“The understanding between the parties to the contract was that Schott would forward orders for the material covered by the contract as the work progressed” (Tr. of Rec. 519-520).

We would not feel it at all necessary to do more than call the Court's attention to these facts if they had not been so strongly and almost vehemently questioned by counsel for Illinois Surety Company. Julian C. Smith, who was in the year 1908 a salesman for the Supply Company (Tr. of Rec. 409-410), who severed his connection with the Supply Company in 1911 (Tr. of Rec. 411), and who was at the time he became a witness in this case “President of the Smith-Potman Company” (Tr. of Rec. 409, 410), “a competitor of the Western Roofing & Sup-

ply Company" (Tr. of Rec. 414), and "a totally disinterested party" (Tr. of Rec. 417), testified that he got a written order from Schott "along in the early fall of 1908" (Tr. of Rec. 410, 417), and that he took the order to the Supply Company (Tr. of Rec. 417). Albert B. Cole, who at the time of the trial was "Manager and Treasurer of the Western Roofing & Supply Company" (Tr. of Rec. 421), testified that he saw the written contract referred to by Smith and that, while he did not remember what date the order bore, he believed it was gotten "in the month of October, 1908" (Tr. of Rec. 421). He explained that he had been unable to find the order after a search through all of his records (Tr. of Rec. 421). While it was denied by one of the counsel for the Surety Company that there ever was such a contract (Tr. of Rec. 415), no attempt was made to support such denial by proof. The inference which the Surety Company sought to have drawn was that since the materials for which claim is made were all ordered by specific "requisitions" subsequently sent to the Supply Company, the materials were not furnished under and in accordance with the terms of the said contract, but that each "requisition" when accepted became a separate contract. We are compelled to believe the truth and accuracy of facts stated by Smith and Cole concerning this contract, because if they were not true, the Surety Company would have had Schott testify, as he was available and did testify concerning other matters.

The finding of the court (Tr. of Rec. 519-520) that the parties understood that the materials

covered by the contract were to be called for by subsequent orders is strongly supported by the evidence. The following are statements from Smith's testimony:

"Mr. Schott gave me an order for this material that he would require on this work" (Tr. of Rec. 411).

"Originally there was the order, blanket order covering the material, all of the material that he would require on that work" (Tr. of Rec. 412).

"They (the Supply Company) filled that order at stated prices. Mr. Schott closed the order to protect himself on the prices" (Tr. of Rec. 414).

"It would look to me as though those orders (referring to the subsequent orders or requisitions for certain amounts of the materials) were applied on that blanket order" (Tr. of Rec. 415).

"I received the order from Mr. Schott, as I told you, for that material and he had the privilege of drawing orders, drawing on that order as fast as he wanted it" (Tr. of Rec. 417).

The following appears on page 419 of the record:

"Mr. Allen: And later on he simply was to give you instructions as to when this company should ship that stuff, is that right, or were there further instructions?"

A. No, that was right.

Mr. Peffers: Wasn't each shipment made on each order that way?

A. As he required the material.

Q. Yes, with each order? A. We were furnished with the order just as he required the material.

Q. And you would not ship until you got that order? A. An order would call for the stuff they wished, a thousand feet of covering—

Mr. Hopkins: There would be an order for that?

A. An order for that.

Q. In other words you would not ship without a specific order?

The Court: Well, that is perfectly plain."

Cole was asked whether he remembered whether the "original contract contained anything relative to time and manner of the performance of the contract," to which he replied, My recollection is that the original order stated that shipments of goods were to be made on orders to be sent in at some future time" (Tr. of Rec. 467).

The trial court at one time seemed to think the contract with Schott was not binding, saying (Tr. of Rec. 420): "The difficulty is the first order would not be valid or binding because that did not describe any amount, just a blanket order." But his idea was changed by the witness Smith immediately volunteering as follows:

"The Witness: Just a moment. There was the size and quantity set out in the blanket order.

The Court: But not the quantity.

A. Yes, sir.

Q. But was it an order for a given quantity, no more and no less?

A. It gave the quantity and sizes. * * *

Q. Was it to be as much covering as he needed for his pipe?

A. Yes, he figured it according to the class, what he wanted according to the measurements.

Mr. Allen: Did he approximate those amounts, Mr. Smith?

A. Why, he had all the items as I recollect, all the sizes in 8 inch, 6 inch, 12 inch, so many feet each" (Tr. of Rec. 420).

We now have seen clearly that the Supply Company entered into a valid contract with Schott himself after he, as principal, and Illinois Surety Company, as surety, had executed a bond for the protection of the United States and materialmen and laborers. When the Supply Company made this contract it doubtless relied on the bond for protection. The Supply Company undoubtedly furnished the materials under its contract with Schott. This must be so, for there can be no serious contention that there was any other contract, the different requisitions for specific amounts of goods not being separate contracts, but, according to the uncontradicted testimony of two witnesses, mere shipping directions given "for the material covered by the contract as the work progressed" (Tr. of Rec. 520).

II.

UNLESS THERE WAS A NOVATION SCHOTT AND HIS SURETY ARE LIABLE FOR GOODS FURNISHED "BY THE PROCUREMENT OR CONSENT" OF SCHOTT.

We now are told by counsel for the Surety Company that the Surety Company is not liable; that the Supply Company is estopped from holding Schott and his surety. Let us examine this contention with care. The doctrine of estoppel is, of course, a well recognized and important one, but the use of the term is often misleading, and sometimes serves merely to confuse the issues. Estoppel, as we understand the term, is based simply upon a representation, expressed or implied, that a certain fact or state of facts is true. If there are any representations which could be availed of by Schott (assuming that

there was no bankruptcy proceeding or that bankruptcy does not discharge a debt of this kind) and which can be availed of by his surety, they must be unequivocal representations by the Supply Company of its consent to give up Schott as its debtor, and look solely to the Engineering Company for payment. In other words, there must have been a novation. If A has a contract with B, the only ways, generally speaking, in which B can avoid liability for not performing is by securing an agreement from A to release him, or by A's own failure to perform. If there is a representation by the Supply Company that it gives up Schott as its debtor and will look to his successor only, there is a novation, provided either there is a consideration for the agreement or representation in the nature of a binding promise by the assignee to carry out the contract, or the party relying upon such representation has acted to his or its detriment. If there is no such representation, there is no novation, nor could there be any estoppel. Bigelow, *Law of Estoppel*, 4th Ed., 552.

Most of the goods were consigned to "W. H. Schott." But if they all had been consigned to "The Schott Engineering Company" with knowledge on the part of the Supply Company that the Engineering Company was a corporation (which the Supply Company did not know), Schott would still be liable if the delivery was made by his "procurement or consent," unless there was a novation. This is very clearly stated by Judge Jenkins of the Seventh Circuit Court of Appeals:

"Delivery of the machines to the company without consent of the defendants would work a

failure of contract by the plaintiff, not a substitution of debtor. Delivery by the procurement or consent of the defendants is a fulfillment of the contract, not of itself availing to discharge the original debtor. * * * Delivery would be rightfully made pursuant to the direction of the defendants. Such delivery would be in fulfillment of the contract." *American Paper-Bag Co. v. Van Nortwick*, 52 Fed. 752, at 754, 755.

In this case there cannot be any question, as was said by the trial court, that delivery was made "by the procurement or consent" of Schott. He was the person who had the contract for the goods. He must have directed the parties who sent the different requisitions on the original contract to order the goods, otherwise they would not have made such statements as these: "The list of covering hereto attached and as per Gov. requirements with which your Mr. Smith is familiar" (Tr. of Rec. 437). "As per Gov. specifications and with which your Mr. Smith is familiar" (Tr. of Rec. 438). Mr. Smith had had no dealings with anybody but Schott. The goods are directed by all the written requisitions except two to be shipped to W. H. Schott. If the persons assuming to act for the Engineering Company had not been told by Schott to order these goods under his contract, the words "The Schott Eng. Co." following the words "Please ship to" would never have been erased. Schott's procurement or consent is shown further by the fact found by the trial court, that Schott himself during the year 1909 wrote letters to the Supply Company "concerning materials covered by the aforesaid contract" "on letterheads bearing the name and signature of W. H. Schott" (Tr. of Rec. 523, 469).

Much stress has been laid by counsel for plaintiff in error upon his contention that after the organization of the corporation the Supply Company "dealt" solely with the Schott Engineering Company (Br., Pltf. in Error, 90). This is a loose term which has been used continuously since the cause came before the trial court. The question is not with whom the Supply Company "dealt." The first question is, under what contract, if any, were the materials in question furnished. If they were furnished under, pursuant to, and at the prices stated in Schott's contract, the next question is, did the Supply Company agree to give up Schott and his surety as its debtors? If it did, the Surety Company is released. If it did not, but continued with the "procurement or consent" of Schott to deliver the materials at Lake Bluff under his contract, it is respectfully submitted the Surety Company is liable.

We submit that there was no failure of contract, as by failure to deliver, or by delivery to a stranger, and if Schott was released it must have been by a novation, and not by anything vaguely called estoppel and "dealing" with the Engineering Company.

III.

THERE WAS NO NOVATION.

A.

The Supply Company did not know at the time the goods were being furnished that a corporation had succeeded Schott.

Before considering any of the cases dealing with the question what constitutes a novation, it is safe to say that the Supply Company could not be held to have agreed to give up Schott as its debtor and look solely to the Engineering Company unless the Supply Company knew or had sufficient reason to believe that the Engineering Company was a corporation or a different entity from Schott. Smith and Cole both testified that they did not know that Schott had been succeeded by a corporation (Tr. of Rec. 468, 412). After stating that they had not received "any such information," Cole said (Tr. of Rec. 468): "My impression is that when those orders were received we paid no attention to whether the orders were received from Schott Engineering Company, W. H. Schott, or W. H. Schott Company * * * being under the impression * * *." Here he was interrupted and not permitted to finish. Smith's statement concerning this matter is: "I don't know whether he was representing the Schott Engineering Company or W. H. Schott or who it was. We shipped the material to W. H. Schott, whatever name it was, but of course that is a year or two years ago, the time I represented the Western Roofing on their work" (Tr. of Rec. 412). The defendants in error

made no attempt to show by Schott or any other witness that the Supply Company had any knowledge that the Engineering Company was Schott's successor.

The only fact from which the trial court possibly could have found that the Supply Company knew of the succession was that some of the correspondence and all of the requisitions bore the printed name, "The Schott Engineering Company." In other words, the honorable trial court necessarily held that this name, personal in its nature (because it contained Schott's own name) did apprise the Supply Company that Schott had been succeeded by a corporation, notwithstanding the fact that both Cole and Smith—the "disinterested party"—testified to the contrary.

Turning to the cases, we find that the trial court's ruling is contrary to the overwhelming weight of authority. In the case of *Guckert v. Hacke*, 159 Pa. St. 303, it appears that the plaintiff entered into a contract with Hughes & Gawthrop Co. There was no evidence that he had had any prior dealings with the men then assuming to do business as a corporation. The following language of the court, found on page 307, is equally applicable to our case:

"But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business or in their conduct, which should have put him upon inquiry."

To the same effect is the case of *N. Y. Nat. Ex. Bank v. Crowell*, 177 Pa. St. 313. The court said in that case, pages 322-323:

"There is no merit in the contention that the name of Crowell & Class Cold Storage Company and the form in which the note is signed (The Crowell & Class Cold Storage Co. By Charles H. Newell, Treas.), etc., were sufficient to put the plaintiff bank upon inquiry, and that due prosecution of that inquiry would have disclosed the fact that the maker of the note was an incorporated association and not a partnership. * * * Such business names are perhaps as commonly used at present by unincorporated associations, partnerships and individuals as by corporations. The forms and methods of business corporations are frequently adopted by unincorporated associations, partnerships, etc., and their business conducted by a president, cashier, etc."

In the case of *Owen v. Shepard*, 59 Fed. 746, decided by the Eighth Circuit Court of Appeals, the question was whether the name "Indian Trading Company" (a very impersonal name) imported a corporation. It was held not, the court saying, on page 749:

"But the name did not distinctly purport to be the name of a corporation. Individuals may carry on business under any name and style they may choose to adopt."

The Supreme Court of Alabama held that the name "Wetumpka Lumber Company" did not import a corporation. *Clark v. Jones & Bro.*, 87 Ala. 474.

It was urged in the court below that the Supply Company wrote letters to the Engineering Company and accepted checks from that company. We submit that this is consistent with the Supply Company's understanding that the Engineering Company was

Schott or Schott's company. The following language of the court in the case of *Tobias v. Wierck*, 48 N. Y. Supp. 146, found on page 147, is in point:

"True, the plaintiff by receiving checks made out in the name of the Liberty Steamboat Company for bills rendered, became aware that the business was from a certain period conducted in that name; but it was quite competent for the former owners to continue their business in such a manner without any articles of incorporation."

The plaintiff in the case of *Cornwell v. Megins*, 39 Minn. 407, entered into a stumpage contract "with the appellant, Megins, and the other defendants, S. F. Crockett, and John J. Shotwell. After the contract was made, the defendants organized a corporation (the Dakota Lumber Co.), which carried out the contract, and made to the plaintiff the reports and payments required by the contract" (407). The plaintiff thereafter addressed them as such corporation. Even though all these facts appeared, the court did not hesitate to say on page 408:

"There is no testimony to indicate that plaintiff knew, when dealing with defendants, that they had organized a corporation. He evidently knew that they were doing business as the Dakota Lumber Company; he received letters and remittances and in his correspondence addressed them as such company; but this, of itself, is insufficient to relieve each person to the contract from his liability thereunder. In no manner did plaintiff release the defendants from their contract obligations."

It was urged further before the trial court that the Supply Company sometime after the corporation was organized began to charge the goods to

"The Schott Engineering Company." That is consistent of course with the Supply Company's belief that there had been a mere change of name. It was held in the *C'ark* case, *supra*, page 480:

"The mere fact that the goods were charged to the company on the books of the plaintiff in the manner shown, is not conclusive that any credit was given to the company."

In view of the doctrine of the cases cited it seems unnecessary to comment upon the cases which affirm the abstract proposition that whatever is sufficient to excite attention is notice of everything to which inquiry might have led.

B.

There was no agreement by the Supply Company to give up Schott and his surety as its debtors and look solely to the assignor of Schott's government contract.

While we urge not only that the Supply Company never knew or had sufficient reason to suspect that the Engineering Company was a corporation, but that, according to the cases cited under "A" that a finding on the facts in this case that it did have such knowledge obviously cannot stand, yet assuming for the purpose of argument, but not otherwise, that the Supply Company did have knowledge of the successorship, the question then would be, did the Supply Company agree to give up Schott as its debtor and look solely to the Engineering Company for payment. Of course,

"It is a fundamental proposition repeated in almost every case, that in a contract of novation

there must be present a meeting of the minds, a mutual assent, an intention to novate." 21 Amer. & Eng. Enc. of Law, 2nd Ed. 666.

"To constitute a novation, the creditor must have consented to the discharge of the original debtor and have accepted the promise of the new debtor." 29 Cyc. 1132.

It is equally as well settled that:

"The burden of establishing a novation is upon the party who asserts its existence. Novation is not easily presumed. It must clearly appear before the court will recognize it." *Netterstrom v. Gallistel*, 110 Ill. App. 352, at 354.

"Such intent (to extinguish the obligation) will not be presumed, but must be clearly established." Jenkins, J., in *Mowry v. Farmers' Loan & Trust Co.*, 76 Fed. 38, at 43.

As was said by the court in the case of *Guckert v. Hacke*, *supra*, on page 307:

"The relation of the parties was fixed by their status when the original contract was made, and cannot be changed by gratuitous inference."

We want to call the Court's very careful attention to the case of *American Paper-Bag Co. v. Van Nortwick, et al.*, 52 Fed. 752, which was before Mr. Justice Harlan and Judges Woods and Jenkins, sitting in the Circuit Court of Appeals of the Seventh Circuit. In that case it appears that the plaintiff agreed to deliver to defendants certain machines made under a patent owned by plaintiff. "The defendants, soon after the execution of the contract in question, organized the Western Paper-Bag Company, to which company these machines were delivered, and by such company they were operated" (p. 753).

"The correspondence with the plaintiff was conducted by the several defendants at times in an individual capacity, and at times in a representative capacity, as officers of the company" (p. 753). "The plaintiff had such knowledge only of that corporation as might be derived from its letterheads upon which the correspondence was in part conducted, and from the official signatures of the defendants, and the use of the corporate name in some of the correspondence" (p. 755). Without going into a detailed comparison of the facts in that case with those in ours, it must be obvious to the Court that the facts in the two cases are substantially identical.

The defendants were held liable individually, the court saying (p. 753):

"We are satisfied that the theory of novation cannot be sustained. We search the record in vain for evidence to uphold such contention. * * * We find therein no suggestion that the company should assume any liability of the defendants upon the contract, no promises to pay such liability, no consent to substitution on the part of the plaintiff, no release of the defendants. It is essential to a novation, by substitution of a new debtor, that the original debtor be discharged and that the substitute assume and be bound for the debt. There must concur the intervention of a new debtor accepted by the creditor for and in release of the original debtor. This is elementary."

It was urged in the instant case that the materials were used by the company and not by Schott individually. The court said, in the *Paper-Bag* case, on pages 754 and 756:

"It is said that consent, substitution and release are to be inferred from the fact that delivery of the machines was made by the plaintiff to the Western Paper-Bag Company, and that the use of the machines for which royalty is here sought was by the company, and not by the defendants individually. * * * Delivery of the machines to the company without consent of the defendants would work a failure of contract by the plaintiff, not a substitution of debtor. Delivery by the procurement or consent of the defendants is in fulfillment of the contract, not of itself availing to discharge the original debtor. * * * So here the defendants by their conduct induced delivery of the machines to the corporation with which they were connected and of which they were the moving spirits. * * * They are estopped * * * Under such circumstances delivery to the company was delivery to the defendants."

We already have shown the Court that Schott was the moving actor behind the deliveries made by the Supply Company. So it is obvious that the defendant by his conduct induced delivery of the materials to the corporation with which he was connected and of which he was the moving spirit. He is estopped.

If we assume that there was in our case a clear assumption of liability by the corporation (which does not appear) such an arrangement between Schott and the Engineering Company would not be in the least binding upon the Supply Company, and assent by the Supply Company could not be inferred if it had made delivery of the materials to the Engineering Company knowing it to be a corporation and a successor of Schott, which it did not know.

"Nor would it avail to a novation if the Western Paper-Bag Company had expressly agreed with the defendants to discharge their liability to the plaintiff. Assumption of liability is not novation unless there concur the consent of the creditor to accept the company in lieu of the defendants and a discharge of the latter. Such consent cannot be implied merely from the delivery of the machines by the plaintiff to and their use by the company. Such delivery and use may well consist with the continued liability of the defendants under their contract; may well speak the disinclination of the plaintiff to trust the company for accruing royalties, and a looking to and reliance upon the defendants to respond under the terms of the contract."

Paper-Bag case, 754.

We already have called the Court's attention to the testimony of Smith and Cole, both of whom assumed that the Engineering Company was Schott.

"The plaintiff was not advised of any transfer of the defendant's interest in the machines. It assumed that the company and the defendants were one in fact."

Paper-Bag case, 755.

In *Illinois Car and Equipment Co. v. Linstroth Wagon Co.*, 112 Fed. 737, before the same court, then made up of Judges Grosscup, Bunn and Jenkins, it appears that the Car Company agreed to furnish the Wagon Company "its season's supply of merchant's bar iron." The Car Company "assigned to the Southern Company the contracts theretofore entered into by the Car Company, including the contract in question; the Southern Company agreeing with the Car Company to perform

and execute the contract." "The Wagon Company was notified and subsequent specifications were forwarded to the Southern Company." The court referred to and squarely reaffirmed the doctrine laid down in the *Paper-Bag* case, saying on page 740, that in that case

"We had occasion to consider the principles upon which the doctrine of novation is founded, and we declared that assumption of liability is not novation unless there concur the consent of the one party to accept the substitute in lieu of the other party to the original contract, and a discharge of the latter. There must be consent by the creditor to take the new debtor as his sole security and to extinguish the claim against the former debtor. Such consent is not to be implied merely from the performance of the contract by the substitute, for that might well consist with the continued liability of the original party, the substitute acting for that purpose in the capacity of agent for the original obligor."

To the same effect is 29 Cyc, 1132-1133.

In our case it appears that the payments were made by the Engineering Company to the Supply Company. In the Car Company case it appears that the Wagon Company was not only informed of the assignment but that thereafter it made payments to the Southern Company, the known assignee of the contract, by which act it might be said it recognized that the Car Company had been discharged of its liabilities. Yet, the court held (page 741):

"Nor does payment by the Wagon Company to the Southern Company prove a novation.

* * * Payment to the Southern Company does

not prove consent by the Wagon Company to a discharge of the liability of the Car Company. There must be something more—some evidence speaking an agreement between the original parties to the contract to discharge the original obligor from liability and to accept the substitute. We fail to discover sufficient evidence in this record proving such agreement. There is no evidence that the Car Company ever sought to be released from its liability, or that the Wagon Company was ever asked to accept the Southern Company as a substitute. There is no direct evidence upon this point, or any evidence from which an agreement in that respect could be implied.”

The evidence in the *Car* case against the plaintiff was certainly stronger than the evidence against the Supply Company, yet Judge Jenkins didn't hesitate to say that there was not in that case “any evidence” from which a novation agreement could be implied.

The case of *Anglo-American Land M. & A. Co. v. Lombard*, 132 Fed. 721, was before Judges Sanborn, Thayer and the present Mr. Justice Van Devanter, the latter writing the opinion of the court. The facts of that case too went much further against the plaintiff than do the facts in our case or in the *Paper-Bag* and *Car* cases. The court held, however, on page 739, without any apparent hesitation, that

“There is no finding that the holders of the indebtedness here sued upon accepted the Missouri Company as a substituted debtor, or that they agreed to discharge or release the Kansas Company or its stockholders; nor can such an agreement be implied, as a matter of law, from the facts found, or any of them. True, the

holders of these claims treated and dealt with the Missouri Company as having succeeded to the business of the Kansas Company, and as having agreed to discharge its debts and liabilities. They also established their claims in the receivership suit, and accepted dividends derived from a sale of the entire assets of the Missouri Company, a material portion of which was not obtained through the Kansas Company. But there is nothing in this which is inconsistent with a purpose and right to assert and enforce these claims against the Kansas Company and its stockholders. * * * A creditor who collects a portion of his claim from a third person, who after the debt is contracted agrees with the debtor to pay it, does not thereby discharge the debtor, or become estopped from collecting the balance from a surety or guarantor. There is in this no election between inconsistent claims or remedies" (p. 739).

The same doctrine is held by the Michigan court in the rather late case, *Harrington-Wiard Co. v. Blomstrom Co.*, 166 Mich. 276. The plaintiff in that case had entered into a contract with the defendant by which the plaintiff agreed to manufacture and deliver and the defendant to take a certain number of automobile motors. Afterwards the assets of the defendant, including this contract, were assigned, the assignees agreeing "to assume and carry out" this contract. The plaintiff was informed and stated "that all the plaintiff wanted was to have these contracts carried out. He did not care whether this was done by the defendant, Mr. Postal, Mr. Bowen, or the Lion Motor Car Company" (p. 280). Thereafter the assignees paid to plaintiff on account the sum of \$2,500. The court quotes with approval from the *Car* case, and held on page 287,

"In our opinion there are several indispensable elements wanting here, to establish the contract of novation:

"(a) Plaintiff is not a party to the contract between Bowen and Postal and the defendant herein even though Bowen and Postal assumed the contracts in question.

"(b) There is no evidence whatever in the record that the plaintiff ever agreed to substitute either Bowen and Postal, or the Lion Motor Car Company, in the place and stead of the defendants" (p. 287).

It follows that if the goods were delivered by the "procurement or consent" of Schott and delivery was made "in fulfillment of the contract," and if the goods were used in the performance of the contract with the Government (which is admitted, Trans. of Rec. 465-466), the Engineering Company was, so far as the Supply Company is concerned, a mere agent of Schott, as regards both Schott and his surety. If the Government, which apparently knew of the assignment, but which, as is its custom, refused to give up Schott as its debtor, should bring suit against the Surety Company, it certainly could not be said that "while Schott may be liable to you (the Government), the Surety Company is not, because, as a matter of fact, the Engineering Company did the work for you." No more could such an answer be made against the claim of the Supply Company, and we deem a discussion of the following authorities on this point unwarranted.

Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 721.

Black v. DeCamp, 78 Iowa, 718, 723.

Philadelphia v. H. C. Nichols Co., 214 Pa. 265, 273.

Kaufman v. Cooper, 46 Neb. 644, 650.

Freeman v. Berkey, 45 Minn. 438.

Abbott v. Morrisette, 46 Minn. 10.

The attorney for plaintiff in error has quoted at length from a North Dakota case, *Standard Oil Co. v. Arnestad*, 6 N. Dak. 255. The purpose of the bond before that court is stated in the bond, as follows:

"The direct purpose of this bond is to secure and indemnify the said company against any loss from shortage on account of stock not being properly accounted for, and loss on account of funds belonging to the said company being misappropriated by the said Arnestad & Eggerud, or either of them, or any to whom they shall intrust the business of the said company. If the said Arnestad and Eggerud shall faithfully and accurately perform the duties as agents for the Standard Oil Company, and shall correctly account for all stocks or funds belonging to the said company, which shall be entrusted to him or his employees acting in his stead, whose acts he herein directly assumes, then the above obligation to be void; otherwise to remain in full force and virtue" (256-257).

The bond in that case was to secure the fidelity of the two, Arnestad and Eggerud, having with each other a sort of partnership relation. As the court pointed out, the surety might, naturally, have relied upon the strong integrity of one having a beneficial influence upon the other, for which reason it would be unreasonable to hold the surety for defalcations made after the withdrawal of one of the members of the firm.

In the case at bar, the surety became liable for goods sold to an individual to be used in the performance of his government contract. There is no limitation of liability to goods which should be sold to Schott only so long as and while he might be under the restraining influence of some third person. The surety relied wholly upon him alone, and if the goods actually were furnished under the contract with him it could make no difference to the surety that Schott carried out the contract through agents, sub-agents or otherwise. In other words, the surety relied upon him and not the means, instrumentality or agency which he should employ to carry out the contract under which he and it were liable.

To this effect is the opinion in the case cited by the North Dakota court. The attorney for the plaintiff in the *Standard Oil* case relied upon *Palmer v. Bagg*, 56 N. Y. 523, and *Hayden v. Hill*, 52 Vt. 259. The court, speaking of those cases, said:

“But, in our judgment, these cases are plainly distinguishable from the cases before us for final settlement. Their facts were different from the facts of this controversy in vital particulars. The sureties there had become responsible for the honesty of an individual agent. As the court very properly held, such sureties took the risk not only of their principal’s dishonesty, but also of the dishonesty of those whom he might employ in any capacity to assist him in the prosecution of the business of the agency. Should he hire a sub-agent as assistant, the sureties would still be bound. And so they would remain liable if he should see fit to give such assistant an interest in the profits of the business of the agency, provided the obli-

gee did not deal with the new firm as agents and thus extinguish the original agency. The sureties in those cases undertook necessarily to guarantee the fidelity of the agent to his trust, and therefore agreed to be responsible for whatever he should do himself or through his agents and employees. They agreed to assume the risk of his integrity and his business judgment in employing assistants in any capacity. It is upon this ground that all of these decisions relied on by counsel for plaintiff proceed" (259-260).

This Court will, of course, readily perceive that the facts in the case at bar are not like those in the *Standard Oil* case, but are like those in the cases commented upon and distinguished by the North Dakota court, which doubtless would hold the surety in the case at bar.

It is respectfully submitted that for the reasons herein set forth the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

WORTH ALLEN,
*Attorney for Western Roofing &
 Supply Company, a Use-Defend-
 ant in Error.*

CHARLES S. HOLT,
Of Counsel.



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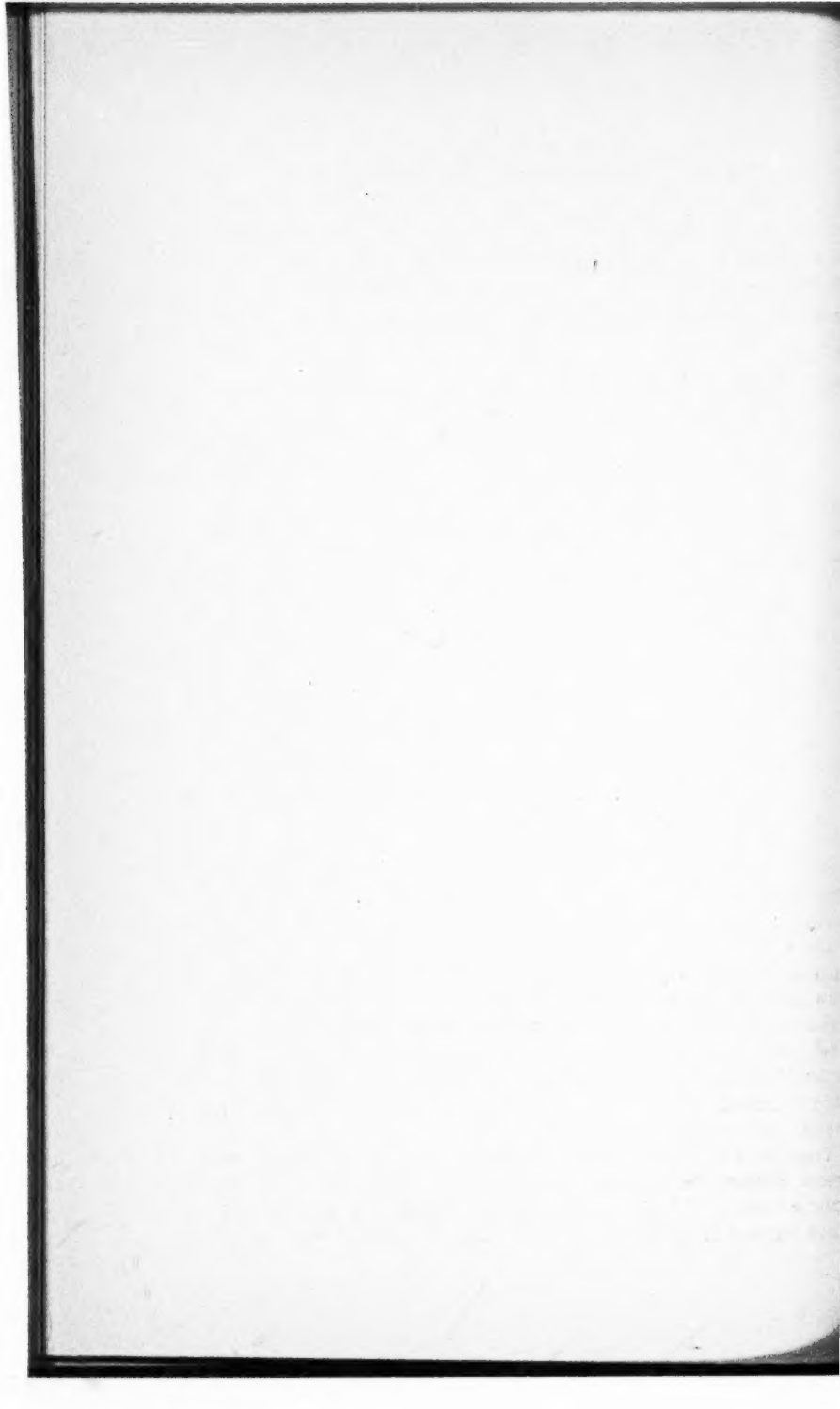
No. 235

ILLINOIS SURETY COMPANY,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA FOR THE USE OF THE
JOHN DAVIS COMPANY, EMMA E. BAIRSTOW,
GEORGE H. BAIRSTOW AND JESSIE B. BLACK-
MER, EXECUTORS., ETC., ET AL.,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

ALBERT J. HOPKINS,
Attorney for Plaintiff in Error.



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendants in error, in the first statement made by them on page 13 of their brief, say that "The bond was given to secure the payment of all labor and material actually used in the work provided by the contract and the assignment of the contract did not affect the liability upon the bond." Neither of the averments contained in this statement is correct. The bond was given under the statute quoted on page 15 of the brief of defendants in error. That part of the statute that is

there quoted in italics is a complete refutation of the above averment.

The statute says that the bond is given "That such contractor or contractors shall promptly make payments to all persons *supplying him or them* with labor and materials in the prosecution of the work provided for in such contract, etc." The statute specifically provides that the payments to material men and laborers by the contractors are for those who supply *him or them*; so that, by the terms of the statute, unless the material is furnished to the contractor, there is no liability on the bond. This court, in construing the statute, has never held that the bondsman of the contractor is liable for material furnished to his assignee. You have held, however, that the bond is liable to the subcontractor and to material men furnishing material to the subcontractor, but have made it clear in each case that the bond is held in those cases *because* the subcontractor is one of the units of the general contractor under which the work is completed; and material furnished to the subcontractor is the same as material furnished to the contractor because the subcontractor is in privity with and subordinate to the contractor.

On page 14 of the brief for defendants in error, they state "All of the stock of this corporation was issued to Schott as the consideration for the transfer. At the time of the transfer, no one but Schott was financially interested in the corporation, but later Schott sold about Thirty-six Thousand Three Hundred Dollars (\$36,300) of preferred stock to outside parties." These statements are not correct; and that there may be no controversy between attorneys for the respective parties in this case, we here quote the findings of fact of the trial court touching the subject matter of those averments:

"3. After the making of said contract and bond,

above mentioned, Schott entered upon the work provided for by said contract, and continued so to do until January 1, 1909. During the period of time between the execution of the contract and bond and January 1, 1909, the matter of Schott's financial condition and the means of paying his debts was taken up by the said 'Creditors Committee' with Schott, and negotiations were entered into between them to develop a plan by which Schott could pay his old debts and get on a sound financial basis for the future. The John Davis Company, through its President, John D. Hibbard, who was a member of the creditors committee, actively participated in these proceedings and negotiations, and was one of the controlling influences therein. In the month of December, 1908, the said Hibbard, with the other members of the said creditors committee, after consultation with Schott, determined that Schott should organize a corporation under the laws of the State of Maine, with a capital stock of \$1,000,000, and that his business, property, and contracts should be transferred to such corporation. It was further agreed that the capital stock of \$1,000,000 should be divided into 750 shares of first preferred stock, which was a first lien and claim on all the property, assets and dividends of the corporation; 4250 shares of second preferred, which was a second lien or claim on said property, assets and dividends; and 5000 shares of common stock, which was subject to the claims of the first and second preferred. The first preferred stock, it was agreed, should be sold by Schott to raise new money to put into the corporation; 1000 shares of the second preferred and his common stock was to be delivered to Schott personally, upon the terms mentioned in the contract of assignment hereinafter set forth. About \$36,300 of the first preferred stock was, after the organization, during 1909, sold to outside parties. Thereafter, at the instance of The John Davis Company, The American Radiator Company, and the United States Cast Iron Pipe & Foundry Company, a corporation with the name and style of 'The Schott Engineering Company' was duly organized under the laws of the State of Maine, which organization was fully completed on December 28, 1908. Pursuant to an agreement made prior to the

organization of the corporation, Messrs. John D. Hibbard, the President of the said John Davis Company, A. J. Goodhue, Vice President of the American Radiator Company, John T. Shay and W. A. Brown as the representative of other creditors, were duly elected directors of said 'The Schott Engineering Company.' That none of the directors, except W. H. Schott was financially interested in the Schott Engineering Company, and each of said directors except Schott had and held merely qualifying shares of stock in said Engineering Company, holding their positions as directors for their respective companies. Said John D. Hibbard had no personal interest in said Schott Engineering Company, and was elected a director thereof as representative of the John Davis Company, and qualified and accepted the office of director in said Schott Engineering Company as the authorized representative of the said John Davis Company. The other members of the board who were elected directors, as representatives of creditors, also accepted such positions and acted as such representatives of their companies respectively. John D. Hibbard was fully authorized under the by-laws of the John Davis Company to do all the things that he undertook to, or did, do while acting as director of said Schott Engineering Company.

3a. The court also finds that all that said John D. Hibbard did, both before and after the organization of said Schott Engineering Company, with reference to the affairs of Schott and the Schott Engineering Company, was done as the representative of and for and on behalf of the said John Davis Company, and wherever in these findings the court refers to the 'John Davis Company' it means the John Davis Company, one of the plaintiffs in this suit.

4. The court further finds that the board of directors of, and the Schott Engineering Company, and its policy and management were, from the time of its organization up to the time it went into bankruptcy, dominated and controlled by the said representatives of the John Davis Company, the American Radiator Company, and the United States Cast Iron Pipe & Foundry Company, and by said Shay and Brown; *that the majority of the capital stock was*

under their control, and the voting power vested in the creditors committee by means of a voting agreement entered into between Schott and this committee.

4a. Further the court finds that a meeting of the directors of the Schott Engineering Company was held at the office of the company, in Chicago, Illinois, on January 2, 1909, at which meeting were present the entire board of directors of said company, consisting of seven members, to wit: said W. H. Schott, A. J. Goodhue, John D. Hibbard, John T. Shay, W. A. Brown, M. O. Payne and Charles R. Schott, the last two of who were employees of the Engineering Company.

4b. At this meeting said John D. Hibbard was acting as the representative of, and for and on behalf of the John Davis Company and not otherwise. At this meeting a proposal was received in writing from said W. H. Schott, and read to the said board of directors in meeting duly assembled, as follows:

‘CHICAGO, January 2nd, 1909.

*The Schott Engineering Company,
1108 American Trust Building,
Chicago.*

GENTLEMEN:

In consideration of your delivery to me, full paid and non-assessable, Seven Hundred Fifty (750) shares par value each \$100.00, of your First Issued Preferred Stock; One Thousand (1,000) shares, par value each \$100.00, of your Preferred stock and Five Thousand (5,000) shares, par value \$100.00 each of your common stock, I propose to assign over to you, the exclusive right, title and ownership of what is known as “The Schott Systems of Central Station Heating,” all right, title and ownership to the contract with the Salt Lake Public Service Company, Salt Lake City, Utah; the same with the Des Moines Heating Company, Des Moines, Iowa, the same with the United States Government on the work at Lake Bluff, North Chicago, Illinois, and to further assign the equity in the following list of securities which are now being used as collateral by me on loans with certain individuals, firms and banks:

\$68,500.00 par value of First Mortgage bonds of the Citizens Mutual Heating Co., Terre Haute, Ind.

\$18,500.00 par value of Common stock of the Citizens Mutual Heating Co., Terre Haute, Ind.

\$36,000.00 par value of 5% Preferred stock of the Mt. Carmel Gas & Electric Co., Mt. Carmel, Ill.

\$54,000.00 par value of Common Stock of the Mt. Carmel Gas & Electric Company, Mt. Carmel, Ill.

\$20,750.00 par value of 8% Preferred Stock of the Schott Specialty Company, Chicago.

\$58,650.45 par value of Common Stock of the Schott Specialty Company, Chicago.

\$60,926.03 Accounts Receivable.

\$11,800.03 Furniture & Fixtures, Pipe, Fittings, Tools and Implements, Stationery, Scales, etc.

It is further understood and agreed that in consideration of the above delivery, you are to assume a total liability in the way of accounts and Bills Payable on account of construction on hand, etc., in the amount of not to exceed the sum of \$50,000.00.

It is further understood and agreed that the Common Stock is to be delivered to me upon the acceptance of this proposition; that the Preferred Stock is to be delivered to me upon my demand; that the Preferred Stock is to be delivered to me pro rata as I pay in to the Treasury of the Company through myself, successors or assigns, at the rate of seventy-five cents (75c) on the dollar.

I am also to assign to the Corporation my life insurance policy now with the North Western Life Insurance Co. in the sum of \$50,000.00 this to be transferred so as to be payable to the Company, it being understood that you are to pay all premiums and carry the same.

This proposition is made based on its prompt acceptance and your taking over the business as of January 1st, 1909, and assuming all responsibility and relieving me of any liability, excepting the liability incident to the complete performance of the true intent of this proposition.

In reference to any of these contracts where the usual course of assignment might cause any discrepancies, as a matter of convenience to you, it is agreeable for the same to be carried through in my name

but all bills are to be paid by you and all receipts are to be delivered to you, so as to give you the benefit, the same as though the accounts were in your name.

Respectfully submitted,
(Signed) W. H. SCHOTT.'

4c. Thereupon at said meeting a resolution was adopted that said corporation, the Schott Engineering Company, did then and there accept the said offer of said Schott above set forth, as submitted, to sell, assign and transfer to said corporation, the Schott Engineering Company, the property, assets, contracts, etc., therein described, and that said corporation should issue the capital stock of the corporation in the manner and form as set forth and the amount prescribed. All the directors, to wit: A. J. Goodhue, John T. Shay, John D. Hibbard, W. A. Brown, M. O. Payne and Charles R. Schott (except Schott himself, who did not vote) voted in favor of the adoption of the resolution accepting said offer of Schott, and the same was declared unanimously carried; whereupon an agreement existed in the terms of said proposal.

The agreement above set forth so entered into by Schott on January 2, 1909, with the Schott Engineering Company, is hereinafter referred to as the 'assignment contract.'

4d. The court finds that the contract mentioned in said assignment contract as the contract 'with the United States Government on the work at Lake Bluff, North Chicago, Illinois,' is the same contract mentioned and described in the declaration filed in this cause, entered into between Schott and the United States Government on July 30, 1908, and the performance of which the bond sued on was given to secure.

5. The court further finds that after the assignment contract was entered into, and on January 2, 1909, the Schott Engineering Company took full charge of the work of performing the contract with the Government entered into on July 30, 1908, as aforesaid; that said Schott Engineering Company, up to the time it was thrown into bankruptcy, did all of the work on said job and everything in connec-

tion with the same; that Schott was elected president of the Schott Engineering Company at said meeting of the board of directors of said company on January 2, 1909, and from that date did nothing on his own account with reference to said contract of July 30, 1908, with the Government, or in the performance thereof; that all that he, Schott, did, after said assignment contract was made, was done for and on account of the Schott Engineering Company, as its president, and that nothing was done on his personal account or behalf; that he did nothing in regard to the said contract of July 30, 1908, or the business transferred to the Schott Engineering Company, without the knowledge and consent of the dominating members of the board of directors, who were the creditors committee.

5a. The court further finds that said assignment contract was fully consummated, and that Schott did transfer and convey to the Schott Engineering Company the property and assets mentioned in said assignment contract, including his life insurance policy, and that said assignment contract included all of Schott's business, assets and property.

5b. The court further finds that all the checks covering remittances from the United States Government under the contract involved in this suit were on the receipt of the same indorsed over by Schott to the Schott Engineering Company, pursuant to the terms of the assignment contract, and that said Schott Engineering Company received to its own use the proceeds of all such remittances from the Government.

5c. The court further finds that the Schott Engineering Company became and was the principal in the contract involved in this case, and that the said John Davis Company, plaintiff in this suit, participated in and was one of the controlling factors in bringing about the substitution of the Schott Engineering Company as principal in the place of Schott, individually, in said contract, and that it, the said John Davis Company, voted for the adoption of said assignment contract, and agreed thereto, at the said meeting held January 2, 1909, through the action of its president, John D. Hibbard.

6. The court further finds that the defendant, Illinois Surety Company, never consented to the assignment of the contract involved in this suit, and had no knowledge of said assignment, nor of any of the proceedings or negotiations concerning the same, until after the Schott Engineering Company went into bankruptcy, on or about the 14th day of January, 1910."

(Transcript of pages 504, 505, 506, 507, 508, and 509.)

Your Honors will observe from the findings of fact of the trial court that Schott was not to receive all of the stock of the corporation. All of the preferred stock was to be sold and the proceeds paid into the corporation. There were to be 4,250 shares of second preferred stock, and of this amount Schott was to receive 1,000 shares and was also to receive the 5,000 shares of common stock which was subordinate to the first and second preferred. The common stock was to be delivered, as shown in the foregoing findings of fact, to Schott on the acceptance of his proposition, and the execution of the contract between him and the Schott Engineering Company, and the preferred stock was not to be delivered to him only pro rata as he paid into the treasury of the company seventy-five cents (75c) on the dollar.

There is no findings of fact by the trial court that any part of the \$36,300 mentioned by counsel for defendants in error ever went into the contract bonded by plaintiff in error. Your Honors will observe from the findings of fact above quoted, that Schott had two or three other contracts as well as the Lake Bluff, North Chicago, Illinois, contract that were assigned and transferred to the Schott Engineering Company,—notably, the Salt Lake Public Service Company, Salt Lake City, Utah, and the Des Moines Heating Company, Des Moines,

Iowa. It is just as pertinent and just as true to assume that the \$36,300 went into the completion of one or both of those contracts as for counsel to assume that this money was used in completing the contract bonded by plaintiff in error.

We desire also to call your Honors' attention to the fact that the stock other than that transferred to Schott, was held in trust by the directors that were under the control of the John Davis Company. It was placed entirely beyond the power of Schott to use it to elect himself a director or an officer of the company. The position he held in the Schott Engineering Company, after the organization of that corporation, was due entirely to Mr. Hibbard, representing the John Davis Company and the other directors who were representing other creditors of Schott. They constituted a majority of the board of directors and took charge of the completion of the contract by the Schott Engineering Company. Mr. Schott ceased absolutely to have any personal interest in the contract or the completion of the work mentioned and described in the contract itself. What he did in the premises was as the hired man of the John Davis Company through Mr. Hibbard and the other directors who controlled the policy and the work of the Schott Engineering Company.

On page 19 of the brief for defendants in error; counsel say that Schott managed the business after the organization of the Schott Engineering Company just as he had before, and that the organization of the company was a continuation of the business with additional capital added, etc. These averments are without any foundation in fact. The findings of fact above quoted is a complete answer to these statements.

After the organization of the Schott Engineering Com-

pany by the John Davis Company, *et al.*, through Mr. Schott, Mr. Schott ceased to have any interest in the completion of the contract. The benefits under that contract were taken over by the Schott Engineering Company, and it took the contract *cum onere*. The assumption that additional capital was added and that thereby the Surety Company was not injured, is also unfounded in fact.

We have just called your Honors' attention to the fact that there is no evidence that any part of the \$36,300 was used on the contract in question. This court held in the case of *Equitable Surety Company v. McMillan*, 234 U. S., page 448:

"The rule that obtains in ordinary cases is that any change in the contract made between the principals without the consent of the surety, discharges the obligation of the latter *even though the change be beneficial to the principal obligor.*" Page 457. (Italics ours.)

This statement but reiterates the rule that has always been maintained by this court and state courts, where the question has arisen. Counsel seem to think that it must be shown that the Surety Company is damaged by the change in the contract before it can complain. This is not the law.

On page 20 of thier brief and argument, they say: "The purpose of the act was to provide security for the payment of all persons furnishing labor and materials." That is correct with the limitations that we have already made in this reply brief,—that is that the materials must not only go into the construction of the building, but must be furnished to the contractor or some one in privity with him. Counsel, in their argument, ignore the fact that materialmen furnishing material, by their own acts may bar themselves from any right of recovery against the

original contractor or his bondsman. That is the trouble with defendants in error in this case. Plaintiff in error is defending this suit because the defendants in error, by their own acts, have barred themselves from any right of recovery on its bond. The case of *Hill v. American Surety Company*, 200 U. S., page 197, is not in conflict with the claims of plaintiff in error. The very quotation that is found on pages 21 and 22 of the brief by defendants in error is a confirmation of the position assumed by plaintiff in error. This court in that case holds that, to enable the materialmen to recover, the material must be furnished either to the contractor or to his subcontractor. When the contractor steps out of the contract by assignment and the assignee assumes the completion of the contract, a different question arises. The material that is furnished to the assignee is no longer furnished to the contractor or one in privity with him. Much is said in the Hill case about the rights of labor and materialmen, but it is language that is pertinent to that particular case and was not intended to assert a principle of law outside of the issue in it.

It frequently happens that, in deciding a proposition at issue in a given case, language is used in illustrating and enforcing the reasons that prompt the court to decide one way or the other that is broader than the issue in the case. This court, in the case of *Cohens v. Virginia*, 6 Wheat. (U. S.), 264, 399, said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be disregarded, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent.

Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

What the court said in the case of *Cohens v. Virginia*, 6 Wheat., 264, *supra*, applies with equal force to the case of the *United States Fidelity & Guaranty Company v. Kenyon*, 204 U. S., 349, and the Mankin case in the 215 U. S., 533, quoted on the same page of the brief of counsel for defendants in error, and in fact the other cases there noted on that page and following pages.

Those cases assert principles of law that are especially and peculiarly applicable to the issues that were presented to the court, but should be disregarded in the present case or in any case not involving the *peculiar facts* that were presented in the cases quoted in the brief of counsel for defendants in error. The cases we have cited in our former brief are full and clear upon the point involved and we refer your Honors to those cases instead of extending this brief by including them here.

On page 28 of the brief for defendants in error, counsel say:

"In several cases, it has been expressly held that an assignment of the contract does not relieve the surety upon such a bond."

We challenge that statement. As stated in our former brief, we have been unable to find a case in the Federal Courts, or, indeed, in the courts of last resort of any state in the Union, where the court has held the surety liable for work and material furnished the assignee of the principal in the surety's bond where the assignment was made without the knowledge or consent of the surety.

The cases quoted by them on page 28 of their brief and the subsequent pages, in support of their position, do

not sustain their statement. *Mullin v. U. S.*, 109 Fed., 817 is not in point. Regan was the contractor and an obligor on the bond. Krueger, ~~Prue~~ and Mullin were indemnitors of the Fidelity and Deposit Company that went on the bond of Regan. The Chapin-Hall Lumber Company made a contract with Regan in writing, for furnishing the materials and labor at an agreed price, etc. Regan gave up, and with the consent of *all concerned*, the indemnitors of the surety company took up the completion of the work under the contract, etc. Chapin-Hall Lumber Company kept on and furnished the material and labor under the written contract with Regan.

We have shown enough here to differentiate this case from the case at bar. Of course, the Surety Company, if it agreed to allow the indemnitors to complete the contract, would be bound precisely as it would be if Regan had completed it. In the case at bar, the Surety Company knew nothing about the assignment of Schott to the Schott Engineering Company, and it knew nothing of the defendants in error furnishing material to the Schott Engineering Company until the time of the bankruptcy proceedings, etc.

The case of *City Trust Safe Deposit & Surety Company v. U. S.*, 147 Fed., 155, is where O'Brien and Sheehan entered into a contract with the United States for the construction of a dry dock and gave a bond with the Surety Company as surety, as required by the statute. *The firm name was never changed.* The contracts that were made, the materials furnished and the labor done were for O'Brien and Sheehan. Perkins and Hale became silent partners of the firm, but the firm name remained as it was and the contracts were made with O'Brien and Sheehan and the materials furnished O'Brien and Sheehan. Under such circumstances, the

court held that the Surety Company was liable on the bond of O'Brien and Sheehan as they remained all through the contract the principal contractors and everything was done in their name. From no point of view can this case be regarded as an authority in the case under consideration.

While this case in no respect sustains the contention of counsel for defendants in error, it is in direct conflict with the holding of this court in the case of *National Bank v. Hall*, 101 U. S. Reports, pages 50 and 51. (For reference to authorities on this point, see page 33, *et seq.*, of our former brief.)

The next case upon which counsel for defendants in error place much reliance is that of *Board of Education v. United States Fidelity & Guaranty Co.*, 166 Missouri Appeal, 410. The most casual reading of that case will effectively dispose of the contention of counsel. The statute under which that case was decided is a Missouri statute and differs in many material respects from the Federal statute under consideration. The interpretation that is given to the Missouri statute by the courts of that state can have no influence in determining the construction of the Federal statute in this case, because this court has given its construction to the statute and has fixed and settled the doctrine that the material furnished and the labor done on the contract must be furnished either to the contractor or to a subcontractor. This court has also clearly defined the difference between a subcontractor and an assignee. Indeed, it requires no judicial decision to determine the difference between these two positions. The assignee becomes the contractor. The original contractor, by virtue of the assignment, drops out of consideration. The subcontractor is one of the methods by which the original contractor completes his contract. He

is an aid and lessens the liability of the contractor to the extent of his assets and his work.

In the Missouri case there was no assignment such as was made by Schott to the Engineering Company. In the Missouri case, on page 416, the court say:

"In the Carey case, there was no evidence tending to show any privity of contract between the original contractors and the relator there. *In the case before us, there are facts in evidence which it is claimed do make the connection.*" (Italics ours.)

The court then follows that statement of a finding of fact on page 420, by saying:

"*It is true that no formal subletting appears, but all of its acts and of the Board of Education support the idea of a subletting and not an assignment of the contract.*" (Italics ours.)

And on page 422, the court say:

"It is beyond question that the surety of a contractor is only liable to those who have done work or furnished material by contract under the original contract; *that the liability of the surety extends only to those in privity by the contract with the original contractor.*" (Italics ours.)

There is nothing in this case that qualified or modifies the opinion of the same court in the case of *Board of Education ex rel. v. Fidelity & Guaranty Co.*, 155 Mo. Appellate, 105, quoted in our former brief and argument on pages 50 to 54 inclusive. Indeed, there is nothing in the case so far as the announcement of law is concerned that conflicts with the position of plaintiff in error taken in its former brief and argument and the authorities there cited.

In the case quoted by counsel for defendants in error, evidence was introduced at the trial that satisfied the trial judge that it was a case of subletting, and the parties to whom the material was furnished were in *privity*

with the original contractor. The principles of law announced on the facts found do not differ from any of the cases that hold that it must be demonstrated to the satisfaction of the trial court that the materials were furnished and the labor performed either for the contractor himself or a subcontractor. In the case at bar, the wildest stretch of imagination cannot torture the Engineering Company into a subcontractor. The authority under which the Engineering Company completed the contract was by a written agreement with Mr. Schott in which it was expressly provided that Schott assigned to it all of his right, title and interest in and to the contract, and was relieved of any responsibility in the premises.

Freeman v. Berkey, 45 Minn., 438, cited on page 32 of brief for defendants in error, is disposed of in the following quotation from the opinion of the court found on page 440:

"A change in the relations between the partners *merely* would not affect plaintiff to whom *both* were bound by the contracts already made, and a delivery to one or performance by one would satisfy the terms of the contract as to both parties."

In the case of *Abbott v. Morrisette*, 46 Minn., 10, the court on page 11, said:

"Thereupon this bond was executed pursuant to the statute, the bond running to the said Perkins, 'for the use of all persons who may do work or furnish materials pursuant to the contract' for construction which is specifically referred to."

The decision of the court in that case turns upon the Minnesota statute. The court further say, on page 11:

"The obligation of the principal obligors and of the sureties is not limited to debts contracted by such principal obligors, the original contractors. The bond is executed under and in pursuance of the

statute and is intended to have a wider scope and effect. It is to be read in connection with the statute
 * * * The material sold by the plaintiffs was furnished pursuant to the contract for the constructing of this block of buildings and in execution thereof *within the meaning of the statute and of the bond when read in the light of the statute.*" (Italics ours.)

This Minnesota case is limited to a construction of the Minnesota statute. The rights of the parties in the case at bar are determined under a Federal statute and this court has repeatedly held that the material must be furnished to the original contractor or his subcontractor. Further comment on these cases is unnecessary.

On page 36 of their brief for defendants in error, counsel say:

"Upon the question of the effect of the assignment of the contract the cases cited by counsel for the Surety Company merely hold the general proposition that where the owner and contractor agree to a material change in the contract without knowledge of the surety the surety is released. Neither the cases nor the principle seem to apply to the facts in this case. Here there was no change in the contract. Schott was always liable and responsible to the Government for its performance. The Engineering Company was merely a subcontractor, responsible to Schott and not to the Government. Schott was still liable under the statute, the contract, and the bond both to the Government and to laborers and materialmen."

Counsel for defendants in error are constantly confusing the contract that plaintiff in error bonded with the Government and the contracts with the nineteen defendants in error. They seem to forget in their argument that this court has held that the contract with the Government is a dual contract,—one for the Government and the other for the materialmen and laborers, and that these two agreements are as distinct as if contained in

separate instruments. The Government is not complaining in this case. The contract with it was completed to its satisfaction. The controversy here is on the contracts with the nineteen defendants, each, under the decisions of this court, being a separate and independent contract and plaintiff in error is defending against those because of the fact they have barred themselves by their own acts from any right of recovery on the bond. They say in the above quotation that the Engineering Company was merely a subcontractor. This is an assertion without any foundation in fact or in law. They have cited no case that is an authority for this statement. Much space is given in their brief and argument to demonstrate that the Hardaway case, 211 U. S., 552, is an authority in support of their contention. We shall not follow them in their analysis of this case. Indeed, it requires no extended review to show the fallacy of their reasoning.

On page 554, the learned justice who delivered the opinion said:

“The question for consideration here is, under the circumstances of the case can Hardaway and Prowell recover upon the bond on their claim as for labor done and materials furnished within the terms thereof?”

And on page 559, he said:

“We are unable to see how that case (the Hill case, 200 U. S., 197) controls the one at bar. Nor can we reach the conclusion that Hardaway and Prowell were subcontractors furnishing labor or materials to the original contractor or furnishing such labor or materials to subcontractors which enabled the original contract to be fulfilled, thereby bringing themselves within the principles of the Hill case.”

And because they were not subcontractors and had not furnished labor and material to the contractor or a sub-

contractor, this court held that they could not recover, notwithstanding the fact that about \$40,000 of their money had been used in the completion of the contract.

ESTOPPEL.

Under the above head, counsel for defendants in error, in their brief commencing on page 43, have undertaken to show that nothing done by the defendants in error can bar them from their right to recover on the bond of the plaintiff in error. They have cited a number of cases which they claim support their position. We do not share the feeling they profess regarding any of the cases quoted in their brief under this head. Quite on the contrary, we hold that not one of them is in point, and that they do not either in the aggregate or separately militate in the least against the position of plaintiff in error as set forth in the original brief filed herein by its counsel.

The first case referred to under this head is *Leather Manufacturers Bank v. Morgan*, 117 U. S., 96. The quotation taken is from page 109. It hasn't the remotest connection with the case at bar. The court there holds that, if a person on a transaction in dispute leads another to believe certain facts exist, or by conduct of culpable negligence calculated to have the same result, and that such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist.

The case now under consideration has none of the elements found in the above quotation on page 45 of the brief for defendants in error. The question here is not

that the plaintiff in error, by something done by the defendants, has been misled into taking certain action to its prejudice; quite on the contrary, it has taken no action whatever. Its claim is that, under the findings of fact of the trial court, the defendants in error took certain action that releases it from liability to them on its bond. If counsel for defendants in error had kept clearly in mind that the contract made with the Government was a dual contract and that plaintiff in error on its bond stood with the defendants in error on a separate and distinct contract from that with the Government, it seems to us they would not have fallen into their error.

The contention of plaintiff in error is that, with a full knowledge of the fact that Schott had assigned the contract in question to the Schott Engineering Company and that it had assumed all liability with each of these defendants for labor and material furnished and to be furnished and used in the completion of the contract, if they dealt with it and furnished material for the completion of the contract, and filed their claims in the Bankrupt Court against it to share in the assets of that Company in the Bankrupt Court, they are barred from denying that they accepted the Engineering Company as their principal in place of Mr. Schott. This released the Surety Company.

As to whether the Surety Company was prejudiced by defendants in error accepting the Schott Engineering Company in place of Mr. Schott is beside the question. As has been repeatedly held by this Court, if the change was made as we have shown it was, by substituting a new principal with these defendants in error in place of Schott, it is a matter of no moment as to whether that change prejudiced or benefited the Surety Company. Under the law as clearly defined by this court, that dis-

charged the Surety Company from any liability in the premises. These defendants, with a full knowledge of the terms and conditions of the assignment from Schott to the Engineering Company, were in a position where they had a right to accept or reject any orders for material from it. They were not obligated to deal with the Schott Engineering Company, and they could have held Mr. Schott for anything they had furnished him that had gone into the construction of the building had they refused to recognize any other person than Schott, but when they dealt with the Schott Engineering Company and furnished it materials for the completion of the contract and sought to benefit in the assets of that Company by filing sworn claims against it in the Bankrupt Court, they thereby accepted it for their principal and barred themselves from any right to recover from the surety.

“When one having the right to accept or reject a transaction takes and retains benefits thereunder he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith.”

16 Cyc., 787b, title “Estoppel.”

Further that:

“The acceptance of benefits of an unauthorized act or an attempt to enforce an obligation based upon such act, will be treated generally as a ratification without direct proof of an intent to ratify.”

30 Cyc., 529.

On page 52 of the brief for defendants in error, counsel say that

“the Davis Company was not a party to the agreement between Schott and the Engineering Company, etc.”

We have shown in the quotation from the findings of fact of the trial court in this reply brief, just what the

Davis Company did through Mr. Hibbard, its President, whom the trial court held in his findings of fact, had full authority to act for the company in the premises. The question, however, is not whether the Davis Company was a party to the agreement between Schott and the Engineering Company *in the first instance*. Schott, through the influence of the Davis Company and others, entered into an agreement with the Engineering Company by which he assigned to it all of his right, title and interest in and to the contract bonded by plaintiff in error, and the Engineering Company in the assignment, assumed to and did complete the contract with the Government. The Davis Company accepted the Engineering Company as a substituted debtor, and with the knowledge that Schott was no longer interested in the completion of the Government contract, furnished this substituted debtor, the Engineering Company, with whatever material it needed in its work on the completion of the contract, and balanced its accounts with it; accepted payments from it on orders it made for material, etc., and to close the matter, filed its claim against the bankrupt estate of the Engineering Company to share in whatever dividends might be declared in that estate.

The case cited by counsel for defendants in error in support of their contention that defendants in error, by their own acts, have not lost their right of action against plaintiff in error, namely: *Anglo-American Land M. & A. Co. v. Lombard*, 132 Fed., 721, is not in point. There is nothing in the decision of the court in that case that interferes in any way with the contention of plaintiff in error. A Kansas corporation that was heavily involved, undertook to transfer its assets and liabilities to a Missouri corporation and thus avoid its *then existing liabilities*. The Missouri Company agreed with the Kansas Company to pay the debts of the Kansas Company.

Indeed, by taking over all of the assets of the Kansas Company, the Missouri Company became liable for the debts of the Kansas Company without relieving the Kansas Company of its obligations to its creditors. The laws of Kansas made the stockholders of the Kansas Company liable to the creditors of the Kansas Company. Some of the creditors of the Kansas Company accepted payments in whole or in part from the Missouri Company. These creditors, however, had no other dealings with the Missouri Company. They did not create any new obligation with the Missouri Company and the only question involved was whether they had accepted the Missouri Company as a substituted debtor.

Suit was brought by creditors of the Kansas Company, charging fraud in the sale of the assets of the Kansas Company to the Missouri Company and seeking to recover their indebtedness at law from the Kansas Company and its stockholders. The defendants in such suit undertook to show that, by virtue of the Missouri Company having assumed the indebtedness of the Kansas Company and some of the creditors having accepted part payment from that company, that they were estopped from prosecuting the Kansas Company or its stockholders. The court found, on page 739, as follows:

“There is no finding that the holders of the indebtedness here sued upon accepted the Missouri Company as a substituted debtor, etc.”

The court found that the acts of the two companies were *ultra vires* and void, and that the Kansas Company and its stockholders were liable to the creditors of that company at the time of the attempted transfer to the Missouri Company as fully and completely as though no such attempted transfer had been made. This case has no analogy to the case at bar. The court finds in the Lombard case, 132 Fed., *supra*, not only that the creditors

of the Kansas Company did not accept the Missouri Company as a substituted debtor, but it was treating of an indebtedness that was a fixed liability prior to the attempted merger of the Kansas Company with the Missouri Company. The rights of the creditors and the liability of the Kansas Company and its stockholders were fixed and determinable before the attempted merger. In the case at bar, with two or three exceptions, all of the claims of defendants in error were those that accrued after the assignment from Schott to the Schott Engineering Company and with parties who dealt *directly with the Schott Engineering Company on its orders*. These two or three exceptions, the findings of fact of the trial court show accepted the Schott Engineering Company *as a substituted debtor for Schott*. They thus ratified and made themselves a party to the assignment agreement between Schott and the Schott Engineering Company.

Under the authorities we have cited in our former brief and argument, commencing on pages 30 and 101, these facts bar the defendants in error from maintaining their several claims against plaintiff in error.

In the Lombard case, *supra*, the fact that the court found that the agreement between the Kansas Company and the Missouri Company was *ultra vires* and void relieved the Missouri Company from the liability that it assumed with the Kansas Company when it agreed to pay its indebtedness and where the contract between the two was void, no creditor of the Kansas Company could recover from the Missouri Company. In the case at bar, the trial court found that the contract of assignment from Schott to the Schott Engineering Company was a valid, subsisting and binding obligation so that, with a knowledge of this assignment, any person who dealt with

the Schott Engineering Company in furnishing material to complete the contract with the Government, made it its debtor and not Schott.

Another case upon which counsel for defendants in error seem to place a great deal of reliance is *American Paper Bag Co. v. Van Nortwick*, 52 Fed., 752.

The American Paper Bag Company was the owner of certain letters patent to the United States on the construction of machines for the manufacture of satchel bottom paper bags. It entered into a contract with the defendants and leased and licensed twelve such patented machines for which a stipulated price was to be paid, and the defendants agreed also to pay a license of five cents for every thousand bags so made. The machines were delivered by the Paper Bag Company to defendants and were operated from December, 1884, to March, 1886. The action was brought to recover the stipulation royalty upon 150,000,000 bags alleged to have been manufactured during that period by the aid of these machines. The defendants, soon after the execution of the contract, organized the Western Paper Bag Company and delivered to that company these machines and the machines were operated by the Western Paper Bag Company. The defendants were the officers and managers of the company and the *only persons interested therein*. The court found that there was no suggestion that the Western Paper Bag Company should assume any liability of the defendants on their contract with the American Paper Bag Company and no promise to pay such liability and no consent to substitution on the part of the plaintiff, the American Paper Bag Company and no release of the defendants. The court also found:

“It is clear from the correspondence that delivery of these machines to the Western Paper Bag Company was with the consent and at the request of the

defendants. They alone, so far as appears and so far as the plaintiff knew, were interested in the company. The plaintiff was not advised of any transfer of the defendants' interest in the machines. It assumed that the company and the defendants were one in fact. It was no concern to the plaintiff that the defendants had chosen to incorporate and to conduct business under a corporate name. Delivery could be rightfully made pursuant to the direction of the defendants. Such delivery would be in fulfillment of the contract. Delivery to the company was at the direction of the defendants. (See page 755.) * * * The delivery here was the precise delivery the defendants desired and requested. Under such circumstances, delivery to the company was delivery to the defendants." (See page 756.)

We have shown enough here, we think to make it clear that the American Paper Bag Company does not support the argument of counsel for defendants in error, and is of no value whatever in support of their contention.

Illinois Car & Equipment Co. v. Linstroth Wagon Co., 112 Fed., 737, is another case upon which they seem to place much reliance. It was an action in assumpsit brought by the defendant in error, the Linstroth Wagon Company against the Illinois Car & Equipment Company to recover damages for default in the performance of a contract dated January 21, 1899, by which the Car Company agreed to furnish the Wagon Company its season's supply of merchant's bar iron not to exceed 300 tons. The Car Company was the proprietor of certain mills at Anniston in the State of Alabama, where it was contemplated the iron was to be manufactured. Its general offices were in the City of Chicago.

The Car Company delivered 190 tons of the iron in accordance with the specifications. It then leased to the Southern Car & Foundry Company for a term of five

years its real property and plant at Anniston, Alabama, including the contract in question, the Southern Company agreeing with the Car Company to perform and execute the contract. The Southern Company shipped to the Wagon Company some of the iron for which the Car Company had received specifications. The Wagon Company was notified of this lease and subsequent specifications were forwarded to the Southern Company. There was a failure to deliver 109 tons of iron, and this action was brought to recover damages for such failure. The first and second counts of the declaration declared upon a sale of 300 tons of merchant's iron at the price stated, and failure to deliver. The third count sets out the contract *in haec verba* and alleges failure to deliver. The fourth count declared common counts in assumpsit. The Car Company pleaded the general issue with an additional plea setting up the defense of a novation. The question that was decided by the court was as to whether there was a novation or not. The court found that, under the facts shown, there was not a novation and that the Car Company breached its contract with the Wagon Company when it assigned its contract to the Southern Company, and that the measure of damages necessarily were the failure to deliver the 109 tons of iron at the price stipulated. The court, on page 741, says:

"There is no evidence that the Car Company ever sought to be released from its liability, or that the Wagon Company was ever asked to accept the Southern Company as a substitute. There is no direct evidence upon this point, or any evidence upon which an agreement in that respect could be implied. Indeed, the declarations of the chief officer of the Car Company, subsequent to the transfer of the mills, clearly establishes that he then recognized the continued liability of the Car Company to respond for any failure in the performance of the contract."

The facts in this case are so widely different from those in the case at bar that it cannot be held as an authority to support the claims of defendants in error, and what is true of this case is equally true of the other cases cited by counsel under this head.

On page 58 of the brief for defendants in error, counsel say:

"Here there was no change in the contract. Schott was always liable and responsible to the Government for its performance. The Engineering Company was merely a sub-contractor responsible to Schott and not to the Government. Schott was still liable under the statute, the contract and the bond to the Government and to laborers and material men. No claim is made that any of the claimants agreed to release Schott from any liability for the material delivered to him."

The question as to the extent of Schott's liability to the Government in this case is not involved. As we have heretofore stated, the contract in question was completed to the satisfaction of the Government, but under the authority of *Burck v. Taylor*, 152 U. S. Reports, 634-648; *Dulaney v. Scudder*, 94 Fed. Reporter, page 6, and *Tinker and Scott v. U. S. Fidelity and Guaranty Co.*, 169 Fed. Reporter, pages 211-244, found on page 42 *et seq.* of our former brief for plaintiff in error, a different question arises with the laborers and material men. The assignment from Schott to the Schott Engineering Company, under the authorities quoted, is a binding, valid contract so far as material men are concerned. They recognized the Schott Engineering Company as a substituted debtor and dealt with it in the completion of the contract with the Government.

It is a matter of no moment to plaintiff in error as to whether the defendants in error, in dealing with the Schott Engineering Company, released Schott from any

liability for materials delivered to him. The substitution of the Schott Engineering Company for Schott in the contracts with these defendants in error changed and altered the original contract and those changes released plaintiff in error as to the material furnished to Schott as well as the Schott Engineering Company. See pages 32 and 33 *et seq.* of the former brief for plaintiff in error.

WESTERN ROOFING & SUPPLY COMPANY.

Counsel for the above defendant in error have filed a separate brief in its behalf. They claim that this defendant in error stands in a more advantageous position than the other defendants in error. They have expressed great faith on a very small foundation. Indeed, there is nothing upon which they can predicate such a claim. The findings of fact of the trial court on this defendant are found on pages 84 to 89, inclusive, of our former brief and argument. Counsel for this defendant in error have presented an argument in favor of their client as though there were no findings of fact by the trial court, and that the question is open for this court to look into the record and see what judgment is warranted by the facts.

We have shown in our previous brief that the evidence upon which the trial court found his facts are found on pages 409 to 499 of the transcript of the record. Ninety pages of the record are taken up by the evidence. An examination of these ninety pages will satisfy this court, we think, that the findings of fact by the trial court are warranted both in fact and in law; but as we understand the rule of this court, defendant in error is concluded by the findings of fact by the trial court. In

the case of *Behn v. Campbell*, 205 U. S. Reports, on page 407, this court held:

"An appeal brings up questions of fact as well as of law, but upon a writ of error, only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact."

Apparently counsel for this defendant in error disagree with the trial court "in dealing with questions of fact." We shall assume, however, that your Honors, in determining the rights of this defendant in error, will be controlled by the findings of fact of the trial court and shall not, therefore, quote from the transcript of the record or multiply the pages of this reply brief by extensive quotations from the transcript of the record.

This brings us then to page 14 of the brief of counsel, where under the second heading, they say:

"Unless there was a novation Schott and his surety are liable for goods furnished by the procurement or consent of Schott."

We stated explicitly in our former brief that there was no novation in this case; that the claim of this defendant in error arose from furnishing material to the Schott Engineering Company on its orders and that the order was charged on its books to the Schott Engineering Company. If there was an agreement on the part of Schott to take certain material from this defendant in error in the construction of the Naval Training Station building at North Chicago, then Schott breached that contract when he assigned his contract to the Schott Engineering Company and it assumed the completion of the building in question. If this defendant in error, on the so-called blanket order of Schott, had manufactured certain goods specifically for this contract and that it would be damaged if Schott failed to take them, it would have a right

of action for breach of contract against him. That would be its remedy. When it received an order from the Schott Engineering Company, there was nothing that prevented it from making inquiries as to whether this was an order under the Schott contract or whether it was an independent order of the Schott Engineering Company. Up to this time, no money had been expended by defendant in error in preparing materials that would be used in the construction of the Federal building in question. There is nothing in the finding of fact of the trial court to show that defendant in error did other than to fill whatever orders came from the Schott Engineering Company from stock of materials on hand that it was selling to all customers who came. Then was the time, if it desired to hold the plaintiff in error, for it to have declined to furnish material to the Schott Engineering Company unless the plaintiff in error would consent to the same. There were no conditions that existed that created a definite liability against Schott at the time these orders were made by the Schott Engineering Company for material, etc. The liability was created by honoring the order and shipping the material. If this defendant in error had refused to honor these orders of the Schott Engineering Company, Schott could not complain because he had parted with all interest in the contract and assigned the same to the Engineering Company. The Schott Engineering Company could not complain; but it would have been required to have gone to some other dealer. In other words, under the finding of fact of the trial court, the Schott Engineering Company stood with this defendant in error when it took over the Government contract from Schott the same as it would with any other dealer who was handling the necessary materials and as to these materials, the defendant in error stood with the Schott Engineering

Company precisely as it would have stood with any other customer on any other building using like materials. The trial judge found, under the facts presented before him, that defendant in error dealt *solely* with the Schott Engineering Company and that there was no liability on the part of plaintiff in error.

This meets all there is in the case of this defendant in error. The suggestion of counsel that the material furnished to the Schott Engineering Company was secured from defendant in error by the procurement or consent of Schott, is without any foundation in fact. The trial court specifically found, in its findings of fact, that Schott ceased to have any interest in the contract after the second day of January, 1909, and that all work after that was work done and materials furnished by the Schott Engineering Company with which Schott personally had no connection whatever.

It is apparent, however, what has caused counsel to make this suggestion; that is, the case of *American Paper Bag Company v. Van Nortwick*, 52 Fed., 752. We have already, in this reply brief, commented upon that case and differentiated it from any of the facts upon which the claims of all the various defendants in error are based. We shall, therefore, take no further time with it.

On page 18 of the brief for the Western Roofing & Supply Company, counsel say there was no novation. So say we all *as to this defendant in error*. We should stop here were it not for the fact that counsel have cited a number of cases which they claim establish the fact that there was no novation, and argue from that the liability of plaintiffs in error. These cases have played a very prominent part in the argument of counsel generally for the defendants in error, and with the indulgence of this

Honorable court, we desire to point out some of the differences that exist between them and the case at bar.

We are not defending Mr. Schott in his dealings with any one of these defendants in error. We are not saying whether he is, or is not liable to any of them. What we are saying is that we are defending a party that stands in an entirely different relation to defendants in error than it would if it were one of the parties principal in this case. We have already pointed out in our previous argument, pages 16 to 21 inclusive, what will relieve a surety from liability on its bond, and have shown that, under the facts in the case at bar, whatever may become of the principal, the surety is discharged from any liability in the premises.

Gickert v. Hacke, 159 Pennsylvania State, 303, cited by counsel on page 19 of their brief, has no bearing whatever upon the issues that are involved in the case at bar. The plaintiffs in that case entered into a contract with Hughes and Gawthorp Company to make some alterations and repairs in a building occupied by that firm. It seems that soon after this contract was made, they undertook to change this partnership into a corporation under the laws of the State of Pennsylvania. They, however, failed to comply with some of the requirements of the statute, and the court held that they were not a corporation. The plaintiffs, in furnishing the materials, etc., had no knowledge of the attempt of these partners to form a corporation, and presented their claim to them for payment, and it seems that a note was executed, signed by these parties as a corporation, and on failure of defendants to pay, plaintiffs sued them. The defense was that the material had been furnished to a corporation and the note of the so-called corporation had been taken and hence the original parties were relieved of

liability. Your Honors will note that there is no question here of a surety. The question was whether the members of the firm of Hughes and Gawthorp Company, by forming a corporation, could be relieved of personal liability for the debt incurred with the plaintiffs. The court, in its opinion on page 306, said:

“It is essential to the creation of a corporation under an enabling statute, that all material provisions should be substantially followed; and exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint stock companies, it follows that those who transact business upon the strength of an organization which is materially defective, are individually liable as partners to those with whom they have dealt.”

And on page 307, in speaking of this case, the court say:

“The principle which treats with the acceptance of a note as additional security to and not as satisfaction of a mechanic’s lien is, with even more justice, applicable here.”

The court held in this case that the plaintiffs were justified in dealing with this firm as partners, and that after they had formed a corporation out of this copartnership, the plaintiffs were still justified in dealing with them as partners, inasmuch as they had failed to notify the plaintiffs of the merger, holding that it was through the fault of the defendants that the plaintiffs were furnishing materials to a corporation and not to a copartnership. In other words, the court in this case, refused to allow the defendants to take advantage of their own wrong. The plaintiffs were innocent parties. The name was unchanged. The corporation name was identical with the partnership name. That is not the case at bar. The Illinois Surety Company did nothing to mislead defend-

ant in error, and it is not responsible for what Mr. Schott did in misleading defendant in error if in fact he did, which we deny.

The case of *N. Y. etc. Bank v. Crowell*, 177 Pennsylvania State Reports, page 313, is another case in principle like the one last noted. The rights and liabilities of a surety are not involved in the case. It is a case where the liability was created with a partnership of the same name as the corporation that it was merged into. The bank that dealt with it and took a note from it, had no knowledge that the partnership had been merged into a corporation. The defense was made that the bank had accepted the note of the corporation and that had relieved the copartnership from liability. The court found in this case, as it did in the 159 Pennsylvania State, that the corporation was incomplete and that the copartners were liable. A brief statement of the case shows that it has no relation to the issue presented to your Honors in the case at bar.

Owen v. Shepard, 59 Fed., 746 is where the defendants were sued by plaintiff under the style of the Indian Trading Company as copartners, for legal fees. The defense was made that the Indian Trading Company was a corporation and that the defendants were not personally liable. Under the pleadings upon which the case was finally tried, the burden rested on the defendants to show that plaintiffs' services were rendered to a corporation as claimed by them. This was the issue in the case. The court held, that the defendants did not prove to the satisfaction of the court that the Indian Trading Company was a corporation. There is nothing in this case that can throw any light upon the case at bar.

We shall not take the time of the court to analyze the

Alabama, New York and Minnesota cases cited by counsel on pages 20 and 21 of their brief. An examination of them shows that they are as wide of the mark as the cases already referred to, and that, by no method of reasoning, can they be brought in to support the contention of counsel for this defendant in error. Schott and the Schott Engineering Company indicate two separate entities. No sane business man, receiving an order from one, would assume that it meant the other. It makes no difference, so far as the rights of the parties are concerned in the case at bar, as to whether the Schott Engineering Company is a copartnership or a corporation. In either event, it is a separate and distinct entity from that of Schott. Counsel, throughout their argument, have assumed that their client could not tell whether the Schott Engineering Company was a corporation or not. *That is not the issue.* It is a corporation, but, as we have said, if several people had formed an Engineering Company, a copartnership, and Schott had assigned his contract to this copartnership as he did to the corporation, the results would be the same. When he ceased to have any interest in the contract for the completion of the Government building, defendants in error dealt with his assignee at their risk. There is no claim in the case that the plaintiff in error had anything to do in bringing about this new condition of affairs, or in inducing the defendants in error to deal with the Schott Engineering Company. It is responsible neither for their blunders nor their engaging in business with the Schott Engineering Company with full knowledge of the changed conditions. The evidence demonstrates, as we have shown, in our former brief and argument, that they furnished materials and held their business relations with the Schott Engineering Company, with full knowledge of the assign-

ment and all of its terms. They are, therefore, in no position whatever to call upon plaintiff in error to make good for what they have lost in dealing with a stranger.

After a careful review of the argument and authorities of counsel for defendants in error, we respectfully maintain that they have failed to meet and answer the position of plaintiff in error as outlined in our former brief and argument, and that the judgment of the Circuit Court of Appeals should be reversed and a judgment rendered in favor of plaintiff in error for costs against all the defendants in error.

Respectfully submitted,

ALBERT J. HOPKINS,
Attorney for Plaintiff in Error.

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October Term, A. D. 1915

No. 235

ILLINOIS SURETY COMPANY

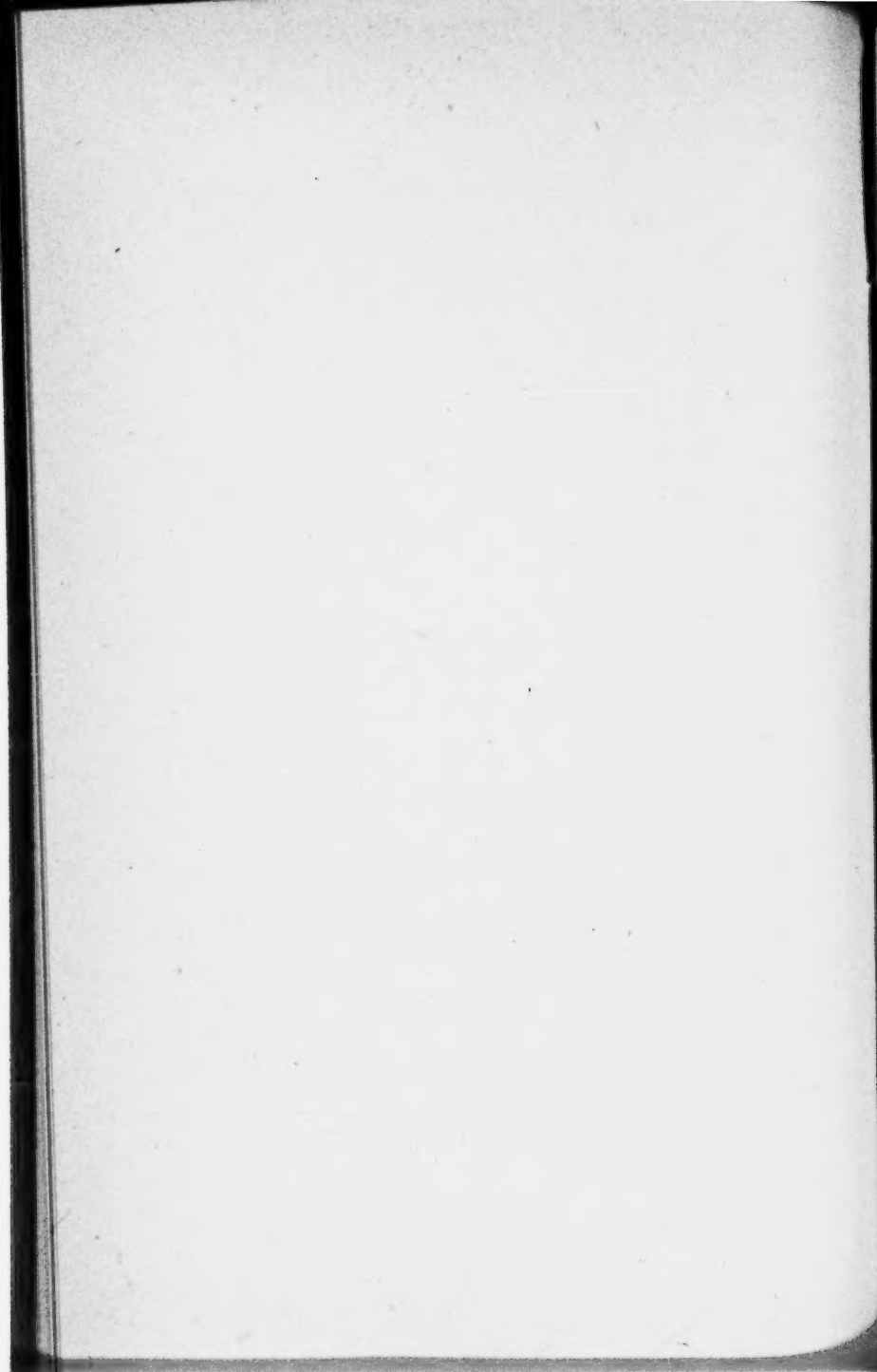
Plaintiff in Error,

UNITED STATES OF AMERICA, vs. THE ONE OF THE JOHN
DAVIS COMPANY, EARL E. HARTMAN, GEORGE H. HARTMAN
AND JESSE B. BLACKMAN, DEFENDANTS, ET AL.

WRIT FOR HABEAS CORPUS

ARNOLD J. HORSING

Attorney for Plaintiff in Error.



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. 235

ILLINOIS SURETY COMPANY,
Plaintiff in Error,

—vs—

UNITED STATES OF AMERICA FOR THE USE OF THE JOHN
DAVIS COMPANY, EMMA E. BAIRSTOW, GEORGE H. BAIRSTOW
AND JESSIE B. BLACKMER, EXECUTORS, ETC., ET AL.,

STATEMENT OF CASE.

This is an action of debt brought by nineteen material men in the name of the United States for their use, under an act of Congress, passed in 1894, 28 Stat. 278, Chap. 280, as amended by an Act of February 24th, 1905, 33 Stat. 811.

The suit grew out of a contract that was entered into on the 30th day of July, 1908, by the United States Government with one, W. H. Schott, for the performance of certain work in connection with the United States Naval Training Station at North Chicago, Illinois. Pursuant to the statute, Schott was required to give a bond to the United States in the penal sum of \$31,047.18. This bond was executed by the Illinois Surety Company.

The condition of the bond is that if Schott, his heirs, etc., shall well and truly and in a satisfactory manner, fulfill and perform the stipulations of the contract entered into between him and the Secretary of the Navy, on behalf of the United States, and shall promptly make payments to all persons supplying him or them labor and material, in the performance of the work, provided for in the contract, then the obligation to be void, otherwise, to be in full force and effect. The bond bears date the 3rd day of August, 1908.

Prior to entering into the contract above named and the bond mentioned, Schott, for a number of years had been engaged as an individual and general contractor, in construction business, with headquarters in the City of Chicago, doing business under the name of W. H. Schott, and that prior to the making of this contract and bond, he had become indebted in a large amount to the American Radiator Company, *The John Davis Company* and the United States Cast Iron Pipe & Foundry Company, and some other concerns, in the aggregate of about Fifty Thousand (\$50,000) Dollars.

A committee, before this date, had been formed, among his creditors, known as the Creditors' Committee, composed of five members, one of which was Henry E. Adams, General Agent of the American Radiator Company; another *John D. Hibbard, President of The John Davis Company*; another A. J. Goodhue, Vice President of the United States Cast Iron Pipe & Foundry Company and W. A. Brown and John T. Shay, representing certain other companies.

After making the contract and the execution of the bond above mentioned Schott entered upon the work provided for by the contract and continued until January 1st, 1909. Schott, at this same time, had entered into certain other contracts that he and the Creditors' Com

mittee regarded as of value, namely, one at Salt Lake City, Utah; another at Des Moines, Iowa, and was the possessor of a large amount of securities and carried life insurance that was regarded as a valuable asset.

During the period that he was at work on this job, the Creditors' Committee took up with him the question of developing a plan by which he could pay his own debts and get on a sound, financial basis for the future. *The John Davis Company, through its President, John D. Hibbard*, who was a member of the Creditors' Committee, actively participated in these proceedings and negotiations and was one of the controlling influences that brought about the change in the affairs of Schott, that will hereafter be mentioned.

In December, 1908, Mr. Hibbard, with the other members of said Creditors' Committee, after consultation with Schott, determined that Schott should organize a corporation, under the laws of the State of Maine, with a capital stock of One Million (\$1,000,000.00) Dollars, and that his business, property, and contracts should be transferred to such corporation. It was further agreed that the capital stock should be a Million Dollars (\$1,000,000.00), divided into 750 shares of first preferred stock, which was to be a first lien and claim on all of the property and assets of the corporation; 4250 shares of second preferred, which was a second lien or claim on the property and assets, etc., and 5000 shares of common stock, which was subject to the claims of the first and second preferred. It was arranged by this Creditors' Committee, *headed by Mr. Hibbard of The John Davis Company* that Schott should sell the first preferred stock to raise new money to pay into the corporation; 1000 shares of the second preferred and his common stock was to be delivered to Schott personally, upon the terms mentioned in the contract of assignment, which will be

stated later. \$36,300.00 of the first preferred stock after the organization of the company in 1909 was sold to outside parties, and at the instance of *The John Davis Company*, the American Radiator Company and the United States Cast Iron Pipe & Foundry Company, a corporation under the name and style of the Schott Engineering Company was duly organized, under the laws of the State of Maine, which organization was fully completed on December 28th, 1908; and pursuant to an agreement made prior to the organization of the corporation *John D. Hibbard*, President of *The John Davis Company*; *A. J. Goodhue*, Vice President of the American Radiator Company, *John T. Shay* and *W. A. Brown*, and the representatives of other creditors, were duly elected directors of the said Schott Engineering Company. These parties held their positions as directors for the companies they represented—their stockholdings being nominal. The Schott Engineering Company, as thus organized, during its entire life, was dominated and controlled by the above-named directors, representing their respective companies. Schott was made president of the company, and under the direction of the Board of Directors, was one of its active managers, but, he had no power or authority to act, other than as directed by the Board of Directors, above named. (Tr. of Rec., 505 and 506.)

The Board of Directors of the Schott Engineering Company was composed of seven members, namely, *John D. Hibbard*, *A. J. Goodhue*, *John T. Shay*, *W. A. Brown*, *W. H. Schott*, *M. O. Payne* and *Chas. R. Schott*—the last two of whom were employees of the Engineering Company.

Through the efforts of Mr. Hibbard, representing *The John Davis Company*, and the other directors, forming a majority of the Board of Directors, who were representing the various creditors of Schott, Schott was induced

to and did on the 2nd day of January, 1909, enter into a written agreement with the Schott Engineering Company, by which he assigned to the Schott Engineering Company, among other contracts and assets, all right, title and interest he had in and to the contract, for the faithful performance of which the Illinois Surety Company's bond was executed. The agreement was consummated on the 2nd day of January, 1909, and was to be effective from the 1st day of January, 1909. The Schott Engineering Company, in consideration of the assignment to it of the property and assets and contracts of W. H. Schott; not only relieved Schott from all responsibility and liability, touching the completion of the contract in question, but also assumed a total liability of his accounts and bills payable, in an amount not to exceed Fifty Thousand (\$50,000) Dollars. (Tr. of Rec., 506, 507 and 508.)

From the date of this assignment, namely, the 2nd day of January, 1909, Schott never had anything further to do towards the completion of the contract with the Secretary of the Navy, for the United States. He personally dropped out of the transaction, as fully and completely as he would have had he died or otherwise become incapacitated, from performing the contract.

On the 2nd day of January, 1909, the Schott Engineering Company, under the control of the Board of Directors, above named, took full charge of the work and the performance of the contract with the Government, entered into on July 30th, 1908, and from that time on, until it was thrown into bankruptcy in January, 1910, furnished all the material and did all of the work on the job. (Tr. of Rec., 508.)

Schott was elected president of the Schott Engineering Company at the meeting of the Board of Directors of the company on January 2nd, 1909, and from that date,

did nothing on his own account, with reference to the contract of July 30th, 1908, with the Government, or with the performance of the same; that whatever he did after said assignment contract was made, was for and on account of the Schott Engineering Company, as its president, and that his acts and doings were governed and controlled by the Board of Directors composed as above stated, of which *Mr. Hibbard of The John Davis Company* was a leading factor.

The Illinois Surety Company never consented to the assignment of the contract involved in this suit by Schott to the Schott Engineering Company, and had no knowledge of the assignment or any of the proceedings or negotiations, relating to the same, or the completion of the contract by the Schott Engineering Company, until after that company had gone into bankruptcy, about the 14th day of January, 1910, and that as soon as it learned of the assignment and the fact that the work had been carried on for a year, in the construction of the Naval Training Station, by the Schott Engineering Company, it denied any responsibility for or connection with the Schott Engineering Company.

A large part of the work on the contract was performed by the Schott Engineering Company during the year from the 2nd of January, 1909, to the 14th of January, 1910, when the company was thrown into bankruptcy. The Government, of course, did not recognize the assignment, and as the estimates were made for the work, sent checks to Schott, which were immediately by him turned over to the Schott Engineering Company.

The District Court of the United States for the Northern District of Illinois, Eastern Division, sitting in bankruptcy, on or about the 14th day of January, 1910, appointed The Central Trust Company of Illinois, a cor-

poration, as receiver of the Schott Engineering Company, and later, that corporation was duly elected trustee of the Schott Engineering Company. The Central Trust Company, as receiver for the Schott Engineering Company, filed its petition in the Bankruptcy Court in January, 1910, and asked for instructions as to whether to proceed to complete the contract in question or not. At the suggestion of the judge, the receiver for the Schott Engineering Company sent out a letter to the creditors of the company, setting forth what had been done and what remained to be done; the amount that was already due from the Government and also stated in the letter that the Illinois Surety Company denied any liability for the Schott Engineering Company, and requested that the various creditors, who had furnished labor and material, should indicate whether the receiver for the Schott Engineering Company should complete the contract or whether it should decline to go on and the Government readvertise and complete the contract. (Tr. of Rec., 510-13.) A number of creditors, each one of whom will be hereafter designated, approved of the receiver for the Schott Engineering Company completing the contract and the responses were so numerous and so favorable, that the United States Judge, sitting in bankruptcy, directed the receiver of the Schott Engineering Company to complete the contract, which it did, and effected a settlement with the Government and collected from the Government the balance that was paid by the Government for the completion of the work. (Tr. of Rec., 514.)

All of the defendants in error filed claims in the Bankruptcy Court against the Schott Engineering Company, in which they alleged that they had furnished to that company material and labor, covering the respec-

tive amounts claimed and that the same was due them, all of which claims were allowed in the Bankruptcy Court against this company and they all shared in whatever dividends were paid by the trustee of the Schott Engineering Company.

The case in the trial court was tried before a court and a jury, but at the conclusion of the testimony, the plaintiffs and defendants both asked for directed verdicts. The court thereupon discharged the jury and later made findings of fact and conclusions of law, upon which judgment was entered. The findings of fact of the trial court are found on pages 501 to 532 inclusive of the Transcript of the Record. The judgment of the trial court will be found on pages 549 to 551 of the Transcript of the Record.

The judgment of the trial court was in favor of claimants, as to all work and material furnished to Schott, prior to his assignment of his contract to the Schott Engineering Company, and was in favor of the surety company against all claimants who furnished labor and material to the Schott Engineering Company.

The amounts of claims for which the trial court entered judgment are as follows:

The John Davis Company	\$11,118.72
Universal Portland Cement Co.	1,123.83
Standard Underground Cable Company.....	2,880.69
Racine Stone Company.....	127.28
Roebbling Construction Company.....	82.72
Total	<u>\$15,333.24</u>

together with interests and costs of the same.

The claims of James B. Clow & Sons, M. H. Hussey, George Racky, doing business as Racky & Son Iron Works, D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company, United States

Equipment Company, James P. Marsh & Company, Raymond Lead Company, Scott Valve Company, George B. Carpenter & Company, Western Kiely Steam Specialty Company, H. W. Johns-Manville Company, Davies Supply Company, Stebbins Hardware Company, Commonwealth Edison Company, H. Channon Company, Maloney Electric Company, Nancy W. Watrous, doing business as G. B. Watrous Sons, Emma E. Bairstow, George H. Bairstow, and Jessie B. Blackmer, executors of the will of F. Bairstow, deceased, Featherstone Foundry & Machine Company, Electric Appliance Company, Western Roofing & Supply Company and Charles A. Daniel, trading as Quaker City Rubber Company, and each of them, were dismissed as to their several claims against the Illinois Surety Company and that company was adjudged to recover its costs and charges in that behalf expended, etc.

These claims that were rejected by the trial court in its findings of fact, were all for material and labor that were furnished to the assignee of Schott, viz.: the Schott Engineering Company, and while they were used in the completion of the building at North Chicago, they were used by Schott's assignee in the discharge of its agreement with him, by which he was to be relieved from any further liability, costs and expenses in the premises.

All of the parties that are now before this court brought their respective claims before the United States Circuit Court of Appeals for the Seventh Circuit by writ of error in two separate suits, respectively, Nos. 2092 and 2093. In that court the cases were consolidated and trial was had in January, 1915, and the rehearing, on the judgment denied August 6th, 1915. The United States Circuit Court of Appeals reversed the judgment of the District Court in both cases and entered a judgment

against the Illinois Surety Company, in the name of the United States for the use of the defendants in error, in the sum of \$31,047.18 *in debt*, and in damages in a like amount.

The aggregate of the claims of defendants in error, as found by the District Court was \$38,121.02. The Circuit Court of Appeals reduced the amount found due to each one of the defendants in error by the district judge, so that the total of the claims of defendants in error would exactly correspond to the amount of plaintiff in error's bond, viz.: \$31,047.18, and then, proceeded to enter judgment for each one of the claimants on the reduced amount, and directed that interest be allowed from the 16th day of August, 1911, with costs, both in that court and the District Court against plaintiff in error, and that the parties have execution on their judgment. The same order of the court provided that the cause should be remanded to the District Court with directions to it to enter there, the judgment which the Circuit Court of Appeals had entered and to enforce the judgment in that court by proper process. See page 592 Transcript of the Record.

Plaintiff in error, believing that it should not be held liable for any of the claims of defendants in error and also holding that the Circuit Court of Appeals erred in entering the judgment that it did in the premises, has brought the case to this court for review and reversal. The assignment of errors by plaintiff in error will be found on pages 597-602 inclusive, of the Transcript of Record.

The principal question to be determined by your Honors is as to whether plaintiff in error can be held liable for labor and material furnished to the Schott Engineering Company, Schott's assignee, by persons who sold

to the Schott Engineering Company with full knowledge of and reliance upon the assignment.

There are other questions of importance that we shall present in our brief and argument. The Circuit Court of Appeals in their opinion, holding the plaintiff in error liable on its bond, have gone further in the construction of the statute, under which this suit is being prosecuted, than any of the other Federal courts, and further than is sanctioned by this Honorable court. In no decision that has been rendered, up to the present time, by this Honorable court, have you gone further than to hold that the original contractor and his surety would be liable for materials and labor furnished to a subcontractor. The reasons that have led your Honors to this conclusion, are clear. The decision of the Court of Appeals in this case, however, hold that if the labor and material went into the building, that the surety company is liable on its bond to any persons, parties or corporations that furnished such labor or material.

The decision in this case is revolutionary and creates a liability on surety companies that write bonds for contractors, under this Federal statute, that has never been dreamed of by the various companies executing such bonds and has never, to our knowledge, been contended for prior to the decision in this case.

I.

SPECIFICATION OF ERRORS.

First. Because the court erred in reversing the judgment entered by the District Court in the above entitled cause in favor of the plaintiff in error and against the following named claimants:

(a) For the use of Emma E. Bairstow, George H. Bairstow, and Jessie B. Blackmer, executors of the will of F. Bairstow, deceased.

(b) For the use of George Racky, doing business as Racky & Sons Iron Works.

(c) For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company.

(d) For the use of United States Equipment Company.

(e) For the use of The Western Kiely Steam Specialty Company.

(f) For the use of H. W. Johns-Manville Company.

(g) For the use of Stebbins Hardware Company.

(h) For the use of Commonwealth Edison Company.

(i) For the use of James B. Clow & Sons.

(j) For the use of Scott Valve Company.

(k) For the use of Electric Appliance Company.

(l) For the use of Western Roofing & Supply Company.

(n) For the use of Maloney Electric Company.

(o) For the use of Nancy M. Watrous, trading as G. B. Watrous Sons, and each of them.

Second. Because the United States Circuit Court of Appeals for the Seventh Circuit did not affirm the judgment of the District Court in favor of plaintiff in error

and against the above named claimants and each of them.

Third. Because the United States Circuit Court of Appeals for the Seventh Circuit in reversing the judgment of the District Court against plaintiff in error on the claim of The John Davis Company did not hold that plaintiff in error is not liable for said claim or any part of the same.

(a) Because said court in reversing the judgment of the District Court on the claim of the Standard Underground Cable Company did not hold that plaintiff in error was not liable for said claim or any part of the same.

(b) Because said court in reversing the judgment of the District Court on claim of the Roebling Construction Company did not hold that plaintiff in error was not liable for said claim or any part of the same.

(c) Because said court in reversing the judgment of the District Court on claim of the Universal Portland Cement Company did not hold that plaintiff in error was not liable for said claim or any part of the same.

(d) Because said court in reversing the judgment of the District Court on claim of the Racine Stone Company did not hold that plaintiff in error was not liable for said claim or any part of the same.

Fourth. Because said United States Circuit Court of Appeals for the Seventh Circuit erred in entering a judgment against plaintiff in error.

(a) For the use of The John Davis Company for the sum of \$13,659.62 or for any sum whatever.

(b) Because said court erred in entering a judgment against plaintiff in error for the use of the Standard Underground Cable Company in the sum of \$2,255.09 or for any sum whatever.

(c) Because said court erred in entering a judgment against plaintiff in error for the use of the Roebling Construction Company in the sum of \$141.63 or for any sum whatever.

(d) Because said court erred in entering a judgment against plaintiff in error for the use of the Universal Portland Cement Company in the sum of \$819.82 or for any sum whatever.

(e) Because said court erred in entering a judgment against plaintiff in error for the use of the Racine Stone Company in the sum of \$92.87 or for any sum whatever.

Fifth. Because the court erred in entering judgment in debt for the full amount of the bond, viz., \$31,047.18.

(a) Because the court erred in entering a judgment for damages against plaintiff in error for the full amount of said bond, viz., \$31,047.18.

(b) Because the court erred in allowing interest on the various claims that in judgments of debt and damages aggregate the amounts above specified.

(c) Because the court erred in allowing interest at 5 per cent. from August 16, 1911, in behalf of each of the claimants whose consolidated claims aggregate the amount of damages awarded, viz., \$31,047.18.

Sixth. Because said court erred in entering a judgment against plaintiff in error for the full amount of its bond and damages for the use of the above named claimants, viz.:

(a) For the use of The John Davis Company \$13,659.62

(b) For the use of Emma E. Bairstow, George H. Bairstow and Jessie B. Blackmer, Executors of the will of F. Bairstow, deceased 514.91

(c) For the use of Standard Underground Cable Company 2,255.09

(d) For the use of George Racky, doing business as Racky & Sons Iron Works	319.37
(e) For the use of D. E. Garrison, Jr., doing business as Garrison & Company and Corrugated Bar Company	61.69
(f) For the use of United States Equipment Company	157.73
(g) For the use of The Roebling Construction Company	141.63
(h) For the use of The Western Kiely Steam Specialty Company	122.97
(i) For the use of H. W. Johns-Manville Company	558.70
(j) For the use of Stebbins Hardware Company	140.32
(k) For the use of Commonwealth Edison Company	60.70
(l) For the use of James B. Clow & Sons	1,652.39
(m) For the use of Scott Valve Company	299.35
(n) For the use of Electric Appliance Company	463.43
(o) For the use of Western Roofing & Supply Company	3,995.34
(p) For the Maloney Electric Company	5,419.84
(q) For the Universal Portland Cement Company	819.82
(r) For the use of Racine Stone Company	92.87
(s) For the use of Nancy M. Watrous, trading as G. B. Watrous Sons	311.41

II.

BRIEF.

1.

Bond of plaintiff in error has a dual function.

First. To secure the performance of the contract with the Government.

Second. To protect laborers and materialmen who furnish the contractor labor and material that go into the work of the building in question.

U. S. v. National Surety Co., 92 Fed., 549.

Equitable Surety Co. v. McMillan, 234 U. S. Rep., 452, and authorities there cited.

2.

Any change or alteration of the contract or invasion of the rights of the surety, without its consent, operates to release it from liability.

Miller v. Stewart, 9 Wheat., 680-702.

Reese v. U. S., 9 Wall., 13-21.

City of Chicago v. Agnew et al., 182 Ill. App. 499-507.

U. S. v. Freel, 186 U. S., 309-316.

The findings of fact by the trial court will be treated by the Supreme Court of the United States as conclusive and unassailable.

Anglo-American Land M. & A. Co. v. Lombard
132 Fed. Rep., 721.

Davis v. Schwartz, 155 U. S., 631.

Norris v. Jackson, 9 Wall., 125.

Copelin v. Insurance Co., 9 Wall., 461-467.

Retzer v. Wood, 109 U. S., 185.

Insurance Co. v. Folsom, 18 Wall., 237.

The Abbotsford, 98 U. S., 440.

3.

That a surety company is discharged by a change of its principals, without its consent, is the settled law of suretyship.

Stearns on Suretyship, Sec. 78.

National Bank v. Hall, 101 U. S., 43-50.

Todd v. School District, 40 Mich., 294-296.

U. S. for the use etc. v. Calif. B. & C. Co., 152 Fed., 559.

The surety company has the right to select the person for whom it will stand as surety.

Arkansas Smelting Co. v. Belden Co., 127 U. S., 379.

National Bank v. Hall, 101 U. S. Rep., 43.

The assignment of a contract by consent of the other party, is in effect, a rescission by agreement and the substitution of a new contract.

Tifton, T. & G. Ry. Co. v. Bedgood & Co., 116 Ga., 945-50.

Haag v. Reichert, 142 Ky., 298-301.

An agreement changed is not the old or prior agreement, but a new one.

Mahaffey v. Wis. Cent. Ry. Co., 147 Ill. App., 43-46.

Plaintiff in error had the right to have Schott's property and the fruits of the contract retained by him and applied to the performance of the contract.

Prairie State Bank v. U. S., 164 U. S. Rep., 227-30.

U. S. for use etc. v. American Bonding Co., 89 Fed., 925.

Reissaus v. Whites, 128 Mo. App., 135-140.

4.

A variance in the agreement, without the surety's consent, by a modifying contract, releases the sureties, *although the alleged liability is incurred under the original contract.*

Bonar v. MacDonald, 3 H. L. Cases, 226.

Pybus v. Gibb, 38 English Law & Equity, 57.

Reese v. U. S., 9 Wall., 13-21.

National Bank v. Hall, 101 U. S. Rep., 50-51.

Prairie State Bank v. United States, 164 U. S. Rep., 236.

Todd v. School District, 40 Mich., 294.

Crittenden v. Armour Barbee & Co., 80 Iowa, 221.

5.

Section 3737 of the Revised Statutes of the United States that forbids an assignment of a contract under the U. S. Statutes, without the approval of the Federal Government, can only be taken advantage of by the Government. The assignment of a contract, so far as the materialmen and laborers are concerned, will be treated as though no such statute was in existence.

Burck v. Taylor, 152 U. S. Rep., 634-48.

Dulaney v. Scudder, 94 Fed., 6-10.

Tinker & Scott v. U. S. Fidelity & Guaranty Co.
169 Fed., 211, and authorities there cited.

U. S. v. Henderlong, 102 Fed. Rep., p. 2.

Guaranty Co. v. Pressed Brick Co., 191 U. S. Rep., 416-425.

6.

An assignment of a contract makes the assignee a new principal.

Mills v. Dow, 133 U. S., 423.

Stearns on Suretyship, Sec. 78, page 109.

7.

There is no privity of contract between plaintiff in error and those who have furnished Schott's assignee, the Schott Engineering Company, material that has gone into the construction of the building in question.

Board of Education v. U. S. Fidelity & Guaranty Co., 134 Southwestern Rep., p. 18.

8.

Defendants in error, who furnished material to the Schott Engineering Company, with a knowledge of the assignment, are bound by the terms of the assignment from Schott to that company.

Drakely v. Gregg, 8 Wall., 242.

Swanson & Gray v. John G. Tarkington et al.,
54 Tenn., 612-14.

Smith v. Hodson, 4th Durnford & East's, 211-17.

Wilmot v. Richardson, N. Y. Court of App., Dec.
Vol. 4; Abbott Dec., 614-18.

Robb v. Vos, 155 U. S., 13-43.

Russ v. Telfener, 57 Fed., 973-74.

In re Insurance Company, 22 Fed., 109-13.

Section 250, Story on Agency, 9th Ed., p. 293.

9.

The receipt of an order from the Schott Engineering Company was sufficient notice to anyone receiving such

order, of the assignment from Schott to that company, and of its terms and conditions.

Whatever is notice enough to excite attention is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.

Wood v. Carpenter, 101 U. S., 140.

Paxson v. Brown, 61 Fed., 883.

29 Cyc., p. 1114-15.

The law will not allow a man to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have had them opened and inquiring, had the consequence of his ignorance been detrimental to himself and advantageous to the other.

See:

C., R. I. & P. R. R. v. Kennedy, 70 Ill., 362.

Marks v. Gartside, 16 Ill. App., 177-179.

If a party omits to inquire, he is bound by all he would have learned, where the circumstances put him on an inquiry.

Hamlin v. Pettibone, 6 Bissell, 172.

Yancy v. Cothran, 32 Fed., 690.

Moore v. Sawyer, 167 Fed., 843.

Standard Oil Co. v. Arnestad, 6 N. D., 255.

10.

To make plaintiff in error liable for materials that went into the construction of the Naval Training Station at North Chicago, under the Schott contract, the materials must have been furnished to Schott personally or to a subcontractor of Schott.

Hill v. American Surety Company, 200 U. S.
197.

Hardaway v. National Surety Co., 211 U. S.,
552.

11.

Contract cannot be split into parts to make surety
company liable.

Reissaus v. Whites, 128 Mo. App., 135.

Reese v. United States, 9 Wall., 13.

III.

ARGUMENT.

This case, as your Honors will observe, comes under the rule of law announced in *United States v. National Surety Company*, 92 Fed. Rep., 549, and approved by this court in *Equitable Surety Co. v. McMillan*, 234 U. S. Rep., 454, where it was held that the obligation, which is the bond of the plaintiff in error in this case has a dual aspect—it being in the first place, to secure to the Government the faithful performance of all obligations which the contractor may assume towards it, all of which have been complied with in this case, and, in the second place, to protect third persons from whom the contractor may obtain material or labor, and *that these two agreements are as distinct as if contained in separate instruments.*

There are, then, in fact, nineteen separate suits involved in the above entitled cause and each case is to be determined by this Honorable Court, from the facts relating to it and the law governing it.

In the judgment of the Circuit Court of Appeals (Tr. of Rec., 591), the John Davis case is the one first passed upon. The trial court found that at the date of the assignment of the contract from Schott to the Schott Engineering Company, the John Davis Company had furnished material that had gone into the construction of the building, amounting to \$15,125.91, and that after January 2nd, 1909, that this company sold and delivered material to the Schott Engineering Company amounting to \$6,766.72. That this company credited upon the account of Schott, items totaling \$5,230.93, leaving a balance due of \$16,661.70, which at the time of the trial, was

unpaid. The credits of \$5,230.93, applied to the charges of 1908, leaving a balance unpaid on material furnished, prior to the assignment, of \$9,893.98. (Tr. of Rec., 515.)

The trial court, in its findings of fact held:

“Schott did nothing personally in the execution of the contract after the date of the assignment contract and anything that he did with reference to the work in question, was done as president of the Schott Engineering Company and for and in its behalf.” (Tr. of Rec., 515.)

The District Court, in its findings of fact, touching the John Davis Company's claim, found as follows:

“14a. As hereinbefore stated, I find that the John Davis Company participated in and shared in bringing about the agreement by which the contract in question was assigned and transferred to the Schott Engineering Company under the terms and stipulations of the assignment contract. The by-laws of the John Davis Company made Hibbard, the president of the company, its chief executive officer, with full authority to make all contracts with reference to the company's business, and to represent it in all of the matters in connection with the negotiations prior to the execution of the assignment contract, and the entering into of the same, and, as hereinbefore stated, that Hibbard had no personal interest in Schott's business or that of the Schott Engineering Company, and everything that he, Hibbard, did with reference to the matters herein referred to was done for and in behalf of the John Davis Company. The Davis Company had full knowledge of the assignment, and that Schott was president of the Engineering Company, and was acting in its behalf, after January 2, 1909.

14b. I further find with reference to the John Davis Company, as above set forth, that it participated in, consented to and helped bring about, the entering into of the assignment contract hereinabove referred to, and in so doing substituted a new principal in the contract involved in this case, all of which was done without the knowledge or consent of the defendant, Illinois Surety Company, and with-

out any consultation with it. I further find that the John Davis Company, after the execution of the assignment contract, and long before this suit was started, and before any controversy arose with reference to the payment for material involved in this claim, the John Davis Company, plaintiff herein, dealt with the Schott Engineering Company as its debtor for the entire amount of the claim of the John Davis Company sued for in this case, and that the Schott Engineering Company and the Davis Company agreed in 1909, and struck a balance, as to the amount that was owing by the Schott Engineering Company to the John Davis Company. The amount as agreed upon included the sum of \$9,893.98, now claimed by the John Davis Company, and also included claims for all materials sold, both before and after the assignment.

14c. December 21, 1909, the Engineering Company received from Schott a check from the Government for \$4,446.92 to apply generally on the work under the Government contract, and sent this check to the John Davis Company, and was by it applied on its claim against Schott, for 1908.

14d. I also find that on February 2, 1910, the John Davis Company received the circular letter hereinabove set forth, which was sent out by the receiver of the Schott Engineering Company on February 1, 1910, addressed to the creditors of the Schott Engineering Company. There is no evidence that the Davis Company made any reply to this letter to the receiver of the Schott Engineering Company. On July 6, 1910, the John Davis Company filed its claim before the referee in bankruptcy in the matter of the Schott Engineering Company, which was as follows:" (Tr. of Rec., 515-516.)

The John Davis Company filed its claim against the Schott Engineering Company in bankruptcy, which included the several sums sought to be recovered in this case.

The trial court further found as a fact as follows:

"14e. I further find that the John Davis Company consented to and helped to bring about the sub-

stitution of a new principal in the contract; that the assignment contract, which was entered into at the instance of said John Davis Company, changed and altered the contract for which the Surety Company gave its bond, and forced a new principal into said contract without the consent of the said Surety Company." (Tr. of Rec., 518.)

This Honorable Court will note that the John Davis Company not only participated in, and shared in bringing about the agreement by which the contract of assignment from Schott to the Schott Engineering Company was executed, but that after the Schott Engineering Company had been made assignee of Schott and had taken over the contract in question, that it furnished to the Schott Engineering Company all of the material that was required of it during the year that the Schott Engineering Company was in existence. The findings of the court show that the Government paid on the contract during this year, over \$100,000, so it is apparent from this that a large part of this work was accomplished, not by Schott personally, but by the Schott Engineering Company, not only with the full knowledge, consent and approval of the John Davis Company, but by its active participation in bringing about the assignment.

Secondly, the court finds as a fact, that after the execution of the assignment in question and before this case was commenced in the District Court, and before any controversy arose with reference to the payment for material involved in the claim of the John Davis Company, that it dealt with the Schott Engineering Company as its debtor, for the entire amount of the claim of the John Davis Company, including the amount sued for in this case, and that during the year 1909, a balance was struck between the Schott Engineering Company and the John Davis Company, as to the amount that was owing by the Schott Engineering Company to the John

Davis Company and that the amount thus found due, included \$9,893.98, now claimed by the John Davis Company and included charges for material furnished before as well as after the assignment.

Third. That by the action of the John Davis Company, as set forth in the findings of fact by the trial court, that a new principal was substituted in this contract with the John Davis Company, and that the substitution was without the knowledge or consent of the plaintiff in error, Illinois Surety Company.

The Circuit Court of Appeals, in their opinion, in speaking of the findings of the trial court, regarding the action taken by the John Davis Company in bringing about the substitution of a new principal, held that while the trial court called it a finding of fact, it was in effect, a conclusion of law and a conclusion in which the Circuit Court of Appeals did not concur, because, as that court claimed, in the assignment no new principal could, as a matter of law, be forced into the only contract in question—that between Schott and the United States.

With all due respect, we hold that the finding of the trial court is an *ultimate* fact and not a conclusion of law, as intimated by the Circuit Court of Appeals. The Circuit Court of Appeals failed to make the distinction that was made by Mr. Justice Van Devanter in the case of *Anglo-American Land, M. & A. Co. v. Lombard*, 132 Fed. Rep., 721. In speaking of the findings of fact by the trial court, Mr. Justice Van Devanter, on page 734 of this report said:

“In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. We have no authority to examine the evidence for the purpose of finding the ultimate facts, or of correcting or completing a special finding which is imperfect or incomplete. * * *

To meet the requirements of the statute, as de-

fined in the decisions of the Supreme Court and of the several Circuit Courts of Appeals, a special finding should be a clear and concise statement of the *ultimate* facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred. The ultimate facts must be so stated that, without inferences, or comparisons, or balancing testimony, or weighing evidence, the case may be determined by the application of pertinent rules of law."

The findings of fact by Judge Sanborn, the trial court, we respectfully maintain came within the requirements as outlined by Mr. Justice Van Devanter in the above quotation. Where the Circuit Court of Appeals, in the case at bar have erred, is that they have failed to distinguish the fact that the contract in question has a dual aspect and that the contract with the Government has been fulfilled to the satisfaction of the Federal Government and that this controversy is on a contract with the John Davis Company for material that it furnished, that went into the construction of the building.

In the case of the *Equitable Surety Company v. McMillan*, 234 U. S. Rep., 448, on page 454, Mr. Justice Pitney, in speaking of the dual character of such a contract under consideration says:

"In an action founded upon a bond given under the latter act, it was held by the Circuit Court of Appeals for the Eighth Circuit, in *United States v. National Surety Co.*, 92 Fed. Rep., 549, 551, that the obligation has a dual aspect, it being given, in the first place, to secure to the Government the faithful performance of all obligations which a contractor may assume towards it; and, in the second place to protect third persons from whom the contractor may obtain materials or labor; and that these two agreements are as distinct as if contained in separate instruments."

This distinction here so tersely put, is entirely overlooked in the opinion for the Circuit Court of Appeals.

In *Davis v. Schwartz*, 155 U. S., on page 636, Mr. Justice Brown, speaking for the court says:

“As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat. 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart v. D'Auchy*, 3 Dall., 321; *Bond v. Brown*, 12 How., 254; *Graham v. Bayne*, 18 How., 60, 62; *Norris v. Jackson*, 9 Wall., 125; *Insurance Co. v. Folsom*, 18 Wall., 237, 249; *The Abbotsford*, 98 U. S., 440.”

Special findings of fact, under Section 649 of the Revised Statutes, are equivalent to special verdicts of juries.

Norris v. Jackson, 9 Wall., 125.

Copelin v. Insurance Co., 9 Wall., 461, quot. from 467.

Retzer v. Wood, 109 U. S., 185.

Under the findings of fact as above outlined, we respectfully maintain that the Circuit Court of Appeals erred in reversing the judgment of the District Court and entering judgment for the amount set forth in its judgment. Plaintiff in error appealed from the decision of the trial court on the John Davis claim, because that court, as we respectfully insist, misapplied the law on the facts, as he found them to exist with that company. The district judge entered judgment for the \$9,893.98 furnished to Schott before the assignment, plus the in-

terest and costs, which aggregated in the judgment, \$11,-118.72, but refused to allow the John Davis Company for any material furnished to the Schott Engineering Company, after the assignment of the Schott contract.

This contract was between Schott and the John Davis Company and the bond of the Illinois Surety Company was executed for the purpose of guaranteeing to the John Davis Company that Schott would fulfill his contract with it and pay for materials furnished, etc., that went into the construction of the Naval Training Station at North Chicago. The finding of fact of the trial court is that the John Davis Company was the prime mover in the plan that resulted in the organization of the Schott Engineering Company and the transfer to it of the Schott contracts, which included the contract with the John Davis Company; thus, substituting a new principal in the contract with the John Davis Company, viz.: the Schott Engineering Company in place of Schott.

The John Davis Company recognized this new principal, and as is found by the trial court in his findings of fact, prior to the commencement of this suit and prior to any action that was taken by anybody in the premises, had a settlement with the Schott Engineering Company, in which it included all of the charges involved in this case and struck a balance with that company, showing how much it was indebted to it, the John Davis Company.

It is admitted of record and so found by the trial court in his findings of fact, that after the second day of January, 1909, Schott did nothing further towards the completion of the contract that he had made with the Federal Government, but that all the work done and material furnished after that date was done and fur-

nished by the Schott Engineering Company, controlled, as we have shown, in our statement of the case, by the John Davis Company and the other creditors of Schott.

By the terms of the assignment, Schott was not only relieved of any further responsibility in the premises by the Schott Engineering Company, but it agreed to hold him harmless from further liability. When, therefore, the John Davis Company furnished material during the year that intervened, from January 2, 1909, to the time the Schott Engineering Company went into bankruptcy in 1910, it had full knowledge of the fact that Schott had dropped as completely out of the contract as though he were dead or physically or mentally incapacitated in going on with the contract in question. The John Davis Company, therefore, treated the Schott Engineering Company during the entire year of 1909 and 1910 as being the new principal in the contract.

Under these circumstances, the plaintiff in error is released from any liability on its bond by the action of the John Davis Company, so far as the claims of that company are concerned.

Any change or alteration of the contract, or invasion of the rights of the surety, without its consent, operates to release it from liability.

United States v. Freel, 186 U. S., 309-316; same case, 92 Fed., 299-301-2.

City of Chicago v. Agnew et al., 182 Ill. App. 499-507.

Reese v. United States, 9 Wall., 13-21.

Miller v. Stewart, 9 Wheat., 680-702.

The substitution of the new principal and the alteration of the relation of Schott to the contract and bond discharged the surety from all liability to those who

consented thereto, or participated or acquiesced in such changes.

See authorities, *supra*.

United States for use v. Calif. B. & C. Co., 152 Fed., 559.

That the surety company is discharged by a change of principals, without its consent, is the settled law of suretyship.

Todd v. School District, 40 Mich., 294-296.

National Bank v. Hall, 101 U. S., 43-50.

Stearns on Suretyship, Section 78.

The surety company had the right to select the person for whom it would stand as surety.

Arkansas Smelting Co. v. Belden Co., 127 U. S., 379.

National Bank v. Hall, 101 U. S., *supra*.

The assignment of the contract, by consent of the other party, is in effect a rescission by agreement and the substitution of a new contract.

In *Tifton, T. & G. Ry. Co. v. Bedgood & Co.*, 116 Georgia, 945, at page 950, the Supreme Court of Georgia, in this connection said:

"Mr. Clark in his work on Contracts, page 524, citing a number of authorities, declares that it is a settled rule that a person cannot assign his liabilities under a contract; or to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it. The same author in dealing with this subject also says that a person may so assign with the consent of the other party to the contract. *But this is in effect a rescission by agreement, and the substitution of a new contract.*"

Haag v. Reichert, 142 Kentucky, 298-301.

An agreement changed is not the old or prior agreement, but a new one.

Mahaffey v. Wis. Cent. Ry. Co., 147 Ill. App., 43-46.

The Surety Company was bound only for Schott. It had the right, under the authorities to look to his ability, character and property to carry out his contract, both with the Government and the materialmen.

The act of the John Davis Company in stripping Schott of the power and authority to complete his contract and of his property was a palpable invasion of the rights of the Surety Company.

By the assignment contract, all of Schott's property, including the remittances from the Government, accruing under the contract involved here, by the acts of the John Davis Company, were passed to a stranger.

The assignment contract transfers all the moneys coming from the Government on the contract *for the use of the corporation*.

The Surety Company had the right to have Schott's property and the fruits of the contract retained by him and applied to the performance of the contract.

Prairie State Bank v. U. S., 164 U. S., 227-236.

United States for use v. American Bonding Co., 89 Fed., 925.

The change and alterations in the contract brought about by the John Davis Company, *put an end to the contract and bond* so far as it is concerned.

"The mere destruction of the identity of the contract, without the surety's consent, is sufficient to operate his release. The reasoning of the law is the surety is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it

nor can it be split into parts so as to be his contract to a certain extent and not for the residue; and, therefore, the surety is either bound in toto or not at all." (Citing eight authorities.) (Italics ours.)

Reissaus v. Whites, 128 Mo. App., 135-145.

"And the law upon these matters is perfectly well settled. Any change in the contract on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. *When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented.* Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have the right to stand upon the very terms of their undertaking." (Italics ours.)

Reese v. United States, 9 Wall., 13-21.

"The change of the firm on the 1st day of April following by taking in Frazee and Greer as new members, without the knowledge or consent of the bank, *put an end to the contract as to the latter.*" * * * A new party could no more be imported into the contract and imposed upon the bank, without its consent, than a change could be made in like manner, in the other pre-existing stipulations. The bank might have been willing to contract with the firm as it was originally, but not as it was subsequently. At any rate it had the right to know and decide for itself. Without its assent a thing was wanting which was indispensable to the continuity of the contract." (Italics ours.)

National Bank v. Hall, 101 U. S., *supra*, pages 50-51.

In *Prairie State Bank v. U. S.*, 164 U. S., at page 236, quoting Brandt on Suretyship, the court said:

"This was put upon the ground that the contract

for which the surety became responsible had been changed, *and he was thereby wholly discharged*, the same as if time had been given, or any other material alteration in the original contract had been made."

In the late case of *City of Chicago v. Agnew*, 182 Ill. App., 499, at page 507, the court said:

"We are of the opinion that the great weight of authority supports the proposition that where the situation of the surety has been materially changed to his prejudice by any act or conduct of the principal debtor and the creditor, the surety is *wholly discharged from liability*."

In *United States v. Freel*, 92 Fed., 299, at page 300 Judge Thomas holds:

"A variance in the agreement without the sureties' consent, by a modifying contract, releases the sureties, *although the alleged liability is incurred under the original contract*." (Citing *Bonar v. MacDonald*, 3 H. L. Cases, 226; *Pybus v. Gibb*, 38 Eng. Law & Eq., 57.)

In *Bonar v. MacDonald*, the decision was by Lord Brougham on appeal to the House of Lords. The other was by the Court of Queen's Bench headed by Lord Campbell. These eminent English judges fifty years ago settled the principles which we now rely upon before your Honors.

The trial court in determining the case of the J. O. Davis Company, held very properly, as we maintain, that the contract of assignment released Schott and his surety, plaintiff in error, from any liability to materialmen or laborers that furnished labor or material under the building in question, after the date of the assignment.

The court failed, however, to note the distinction that is clearly made in the 128 Mo. App., 145, *supra*, and that was made by the court in the case of *U. S. v. Freel*.

92 Fed. Rep., page 299, where, on page 302, the following appears:

“A variance in the agreement, without the sureties’ consent, by a modifying contract, releases the sureties, although the alleged liability is incurred under the *original contract*.” (Citing in support of the text *Bonar v. MacDonald*, 3 H. L. Cas., 226; *Pybus v. Gibb*, 38 Eng. Law & Equity, 57.) (Italics ours.)

As we have already stated, this Missouri case is in harmony with what this Honorable Court has held in the case of *Reese v. U. S.*, 9 Wall., 13-21, and in the case of *National Bank v. Hall*, 101 U. S., *supra*, pages 50-51. In both of these cases it is clearly stated that when the change is made, as outlined in the case under consideration, the surety is not bound by the contract in its original form, for that has ceased to exist, and it is not bound by the contract in its altered form, for to that it has never assented.

The trial judge should have gone a step further in his judgment, relative to the John Davis Company, and should have carried the principles of law in the cases here quoted, into the judgment rendered, and found that the plaintiff in error was not liable to the John Davis Company for any sum whatever, because he could not split the contract into parts and make plaintiff in error liable for a part of the claim, and relieve it from any responsibility as to the balance. As is stated in the Missouri case, when the old contract is destroyed, by making a new principal, there is no liability upon it and there can be no liability upon the new contract because the plaintiff in error is not a party to it.

By the change that was made by the John Davis Company, in securing the substitution of the Schott Engineering Company for Schott, the property and assets of Schott were taken over by the Schott Engineering

Company, and plaintiff in error, as his surety, was deprived thereby, of any right or claim on any of the property and assets that he had when it entered into the contractual relations that it did, in the execution of the bond in question.

This court, in the case of *Prairie State Bank v. U. S.*, 164 U. S. Reports, on page 236, said:

“Mellor, J., said (p. 676), that the question was one of contract, and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into.

Quain, J., said (p. 677): ‘I agree with my brother Mellor, that it is a thoroughly sound and safe principle, that, where the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine, which ought not to be impeached and cannot be impeached, because it is established by authority.’ ”

And in the early case of *Miller v. Stewart*, 9 Wheat., 680, this court used the following language, which has been recently reaffirmed by this Honorable Court:

“Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.”

The John Davis Company, when it furnished material to the Schott Engineering Company was not only cog-

nizant of the fact that Schott, by his assignment to that corporation, had dropped entirely out of the contract, but it was, as the trial court has found, an efficient factor in bringing about this changed condition, to the detriment of plaintiff in error. As was said by the learned judge, in the quotation made by this Honorable Court in the 164 U. S. Reports, *supra*:

"I agree with my brother Mellor, that it is a thoroughly sound and safe principle, that, where the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer."

So we say here, that inasmuch as this altering of the original contract between Schott and the John Davis Company, for material was made by them, without the knowledge or consent of plaintiff in error, and has made it impossible to carry out the contract in the form in which plaintiff in error executed it, the John Davis Company should suffer.

In support of our contention that the plaintiff in error is not liable to the John Davis Company, the case of *Todd v. School District*, 40 Mich., 294, as it seems to us is decisive. On page 296 the court say:

"In August, 1874, Shumway and Breed assigned the contract to one Goodale, and it appears that the school district recognized the validity of the assignment and treated with Goodale thereafter, and agreed with him to extend the time for the completion of the contract. This assignment and extension of time *released the sureties Todd and Hinds from all liability upon their bond* given for the faithful performance of the contract by the original contractors. Their agreement was a personal one that Shumway and Breed would perform the contract, *and not that some other person, to whom they might assign their contract, with the consent of the district, would perform*, or that they would be responsible for the default of such third person.

If this district had not been in default in not procuring and clearing a site, and had they not recognized the validity of the assignment to Goodale, or had the sureties consented to such assignment, it might be otherwise." (Italics ours.)

This case is in harmony with the utterance of this Honorable Court. In *National Bank v. Hall*, 101 U. S., page 43, this court say:

"A new party could no more be imported into the contract and imposed upon the bank without its consent, than a change could be made in like manner in the other pre-existing stipulations."

So we say that the John Davis Company could no more import into the contract and impose upon the plaintiff in error, as surety for Schott, The Schott Engineering Company, without its consent, than could it make other material changes in the other pre-existing stipulations of the bond. The Circuit Court of Appeals in their opinion, seem to have overlooked the principles of law here so clearly stated, not only by the Missouri court, but by this court as well, and have held that the plaintiff in error is not only liable for materials furnished by the John Davis Company to Schott, but to the Schott Engineering Company as well.

Another case that is illuminating upon this point is that of *Crittenden v. Armour, Barbee & Co.*, 80 Ia., 221. On page 223, the Supreme Court of Iowa hold the same rule as did this court in *National Bank v. Hall*, 101 U. S., *supra*. We quote from that case the following:

"The evidence clearly establishes the fact that the parties to the contract were not wholly such as had been agreed upon and accepted by the purchasers of the land. One had refused to enter into the contract, and another, without the knowledge and consent of his associates, had been substituted. These parties not only contracted with the plaintiff, but, by implication of law, contracted with one another. They had chosen their associates, with

whom they agreed to contract. No authority is recognized by the law under which the parties may be changed without the assent of the associates. It is a vital matter, with one entering into a contract of this character, that his associates shall be such as he approves and shall be agreeable to him, and of financial responsibility. It cannot be admitted that, without his assent, an associate may be substituted for one whom he has chosen, who is offensive to him, and is not of sufficient pecuniary responsibility. The change of one or more of the persons necessitates a change of the contract, which cannot be made. An attempt to do so will discharge the associates and annul the contract. Indeed, the contract as it appears with the substituted associate is not the contract in which the minds of the other associates met. It is void, and cannot be enforced. The correctness of the application of this rule to the case, in view of the fact that plaintiff had knowledge of the change, indeed advised, if he did not cause, it, cannot be doubted. (Citing *Bank v. Hall*, 101 U. S., 43, and other cases.)

The change of the parties contracting with plaintiff was procured by the active efforts of Armour, Barbee & Co., who themselves are signers of the contract and defendants in this action. * * * They substitute in the written contract, in place of a party to the agreement, without the assent of the associates, one who was not a party to the agreement, nor an original associate, and they propose to divide between themselves profits of the transaction realized from payments made by the associates in ignorance of these fraudulent acts and concealments. The law will not enforce the contract, for the reason that it has been changed as to the parties, and the acts of plaintiff and his agents are fraudulent as to defendants."

The undisputed facts in the case are that the Illinois Surety Company had no knowledge of this change in the contract, made by the John Davis Company. The cases we have quoted on these points, clearly show that under the facts established in the case, the John Davis

Company is not entitled to recover anything from plaintiff in error, and the judgment of the Appellate Court should be reversed and a judgment rendered against it in favor of plaintiff in error for costs. If this suit had been on a separate and independent contract, between Schott and the John Davis Company, in which contract Schott had agreed to construct a building for the John Davis Company, for the sum of \$30,000, and the Illinois Surety Company had become bondsmen of Schott, for the faithful performance of the contract if the John Davis Company, without the knowledge or consent of the Illinois Surety Company by a subsequent agreement with Schott substituted John Jones in his place, as principal in the contract and John Jones did, from the date of such agreement, go on with the work of the contract, but subsequently defaulted, would any person claim under such circumstances that the Illinois Surety Company could be held to the John Davis Company for such default? When the case is presented in this simple form, the answer is self-evident.

IV.

The opinion of the Circuit Court of Appeals, on page 571 of the Transcript of Record says:

“The main question to be determined is the effect of the assignment of the contract by Schott,”

and further on in the opinion says:

“The statute and bond, literally construed, would seem to afford protection only to those supplying the principal therein, the original contractor; interpreted, however, in the light of the spirit and the purpose of the statute, it clearly aims to give a substitute for the ordinary mechanic’s liens to all who furnish labor or material in the prosecution of

the public work involved in the contract and pursuant thereto, whether their contractual relations are with the original contractor, or a subcontractor or one in a position analogous to that of a subcontractor."

On page 573 of the Transcript of the Record, the court say:

"In our judgment, there is no substantial difference in the legal relation and, therefore, none in the rights of materialmen dealing with a subcontractor and those dealing with an assignee, if the assignment has not been sanctioned by the Government. From the standpoint of the materialmen, such an assignment is, in effect, but a subletting; the original contract remains in full force; the original contractor is still responsible for the undertaking."

We respectfully submit that the learned court is not only in error in the proper construction of the statute under consideration, but also is in error in assuming that there can be no assignment that will affect materialmen if the Government does not recognize the assignment.

This court has never held that a materialman who furnished labor that goes into the construction of the building in question, is entitled to recover on the bond of the original contractor, unless the same was furnished either directly to him or some one in privity with him, like a subcontractor or a materialman, furnishing material to a subcontractor that goes into the construction of the building.

In every case that has been decided by this Honorable Court, under this statute, where the surety has been held liable to the materialman, it has always been where the original contractor still maintained his relation, not only with the Federal Government, on his con-

tract, but with the materialmen, through himself or his subcontractor.

A subcontractor is one who accepts an agreement to perform a part of the original contract and is one of the units by which the original contractor performs his contract. Any material furnished to him is helpful to the contractor in completing his contract, in accordance with the terms of his agreement with the Federal Government, hence, the courts have all held that under these conditions, he and his surety should be responsible for material that is thus furnished for the completion of the contract.

An assignment of a contract by a contractor is just the reverse of a subletting. In an assignment the original contractor steps out of the terms and conditions of his contract and the assignee is substituted in his place. The original contractor is no longer interested in the completion of the contract. The consideration that he receives in the assignment agreement eliminates him entirely from further consideration in the contract.

The Circuit Court of Appeals in the opinion assume that there can be no assignment of a contract like the one in question, that was guaranteed by plaintiff in error, unless the Government consents to it, and quotes in support of that, Section 3737 of the Revised Statutes of the United States. That statute has been construed by this court in the case of *Burck v. Taylor*, 152 U. S. Rep., 634 and on page 648 the court say:

“The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the

government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned, you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration."

The Circuit Court of Appeals for the Fifth Circuit, in the case of *Dulaney v. Scudder*, 94 Fed. Rep., p. 6, on page 10, used the following language:

"Under this transfer, Scudder & Co. completed the work, received payments from the government on estimates, and now claim to own the amount due from the government for the work. This last agreement is the transfer of a contract, within the meaning of Section 3737. Such transfers are not, by that section, declared null and void. The statute causes the 'annulment of the contract * * * so transferred so far as the United States are concerned.' It is intended, as we have shown, for the protection of the United States. The government was free to treat it as annulled, or to recognize the assignment. In *Burck v. Taylor*, 152 U. S., 648, 14 Sup. Ct., 701, commenting on this statute, the court said:

'The express declaration that, so far as the United States are concerned, a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government, in effect, by this section, said to every contractor, "You may deal with your contract as you please, and as you may deal with any other property belonging to you, but, so far as we are concerned, you, and you only, will be recognized either in the

execution of the contract or in the payment of the consideration.””

That no person other than the Federal Government can take advantage of Section 3737 of the Revised Statutes of the United States, is clearly stated by Judge Wolverton in the case of *Tinker & Scott v. United States Fidelity & Guaranty Company*, 169 Federal Rep., page 211. The following quotation is taken from page 214:

“Preliminarily, it should be stated that the stipulation contained in Article 4 of the government's contract with Prendergast & Clarkson was inserted for the benefit and protection of the government alone. It may treat any assignment or transfer of the contract or subletting of the contract work as annulling the same, or it may recognize the acts of the contractors in that respect as valid, as it may feel disposed. All other parties interested, or who may become interested in the contract, save the government, may not insist upon the observance of the stipulation. *Goodman v. Niblack*, 102 U. S., 560, 26 L. Ed., 229; *Hobbs v. McLean*, 117 U. S., 567, 6 Sup. Ct., 870, 29 L. Ed., 940; *Dulaney v. Scudder*, 94 Fed., 6, 36 C. C. A., 52.”

The foregoing authorities make it clear that none of the nineteen defendants in error in this case have any right to insist upon the observance of the statute as can the Federal Government under Section 3737. In other words, so far as the John Davis Company and the other defendants in error are concerned, they stand to the plaintiff in error as though no such statute existed and their rights and the rights of plaintiff in error, must be determined in this case entirely independent of that section of the statute.

The Circuit Court of Appeals in their opinion couple the rights of the materialmen with those of the Federal Government and assume that there can be no assignment of the contract as to them, unless that assignment

is recognized by the Federal Government. These authorities show that the Circuit Court of Appeals in this respect, is in error and that the law is otherwise. The Government primarily, is only interested in seeing that the contract with it shall be carried out and then leaves it to the materialmen, whose rights are clearly defined under the authorities that we have already cited, to protect themselves, under the bond, as they would, had the bond been a separate instrument with the materialmen, as the obligees.

The case of the *United States v. American Bonding Co. & Trust Co.*, found in the 89 Fed. Rep., p. 921, is a case where materialmen brought suit against the bonding company to recover for material that had gone into the construction of the Federal building. In speaking of their attitude before the court, on page 923 the court say:

“In this case, the materials supplied were sold on the faith of the bond, and the case in its circumstances and result, is just as if Heise, Bruns & Co. had been the named obligees in the bond,”

and hold that the action of the materialmen in that case prevented their recovery on the bond of the surety company, as we hold here that the action of the John Davis Company, as set forth in the findings of fact by the trial court, clearly prevent its recovering any of its claims from plaintiff in error.

“The right of action created by the bond in favor of laborers and materialmen is exclusively vested in them by statute. They alone are authorized to bring the suit and to prosecute the same to final judgment and execution. The United States have no interest, either directly or indirectly, in the controversy; nor can they be made liable for costs. The United States, as sole plaintiffs, could not maintain a suit in their own name upon the bond for the recovery of the value of labor or materials supplied

to the contractor in the prosecution of the work.' *United States v. Henderlong*, 102 Fed., 2.

"The Act of Congress of August 13, 1894 does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for to recover what is due to laborers and materialmen. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name." *U. S. v. National Surety Co.*, 92 Fed. Rep., 549.

"The statute provides for a suit in the name of the United States only in cases where the person or persons for whose use and benefit the suit is brought have supplied the contractor 'labor and material in the prosecution of the work provided for in such contract.'" *U. S. v. American Surety Co.*, 127 Fed. 490.

"The statute merely delegates authority to the laborer or materialman to use the name of the United States for his use and benefit in any court having jurisdiction of the subject matter and the parties." *U. S. v. Henderlong*, 102 Fed. Rep., p. 2.

The views as expressed by the Federal courts in the foregoing quotations are supported by the recent decision of this court in the case of *Illinois Surety Company v. Peeler*, 240 U. S. Rep., 214. On pages 224 and 225 in discussing the rights of the United States and of materialmen, who furnished material under the statute in question, this court say:

"If the United States brings the action the persons described are entitled to be made parties and 'to have their rights and claims adjudicated in such action and judgment rendered thereon.' If the United States does not sue within the time specified

they (materialmen), may bring action on the bond in the name of the United States and 'prosecute the same to final judgment and execution.' Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action."

The United States is not interested in the suit of the materialmen. The statute simply provides that the name may be used by any creditor for the purpose of prosecuting his claim, but not otherwise.

We refer to these decisions to show the cleavage that exists between a suit in the name of the United States, for a breach of the contract with the Federal Government and a suit for a creditor, who uses the name of the United States upon which to hang his lawsuit. The United States are no more interested in the result of the suit than they would be if the statute had allowed the materialman to prosecute the case in his individual name.

The clear distinction that is held between the liability on a government contract under the statute in question, in this case, for the completion of the building, etc., and the liability of the contractor or his assignee, to the materialmen, is pointed out by this court in the case of *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. Rep., 416,—on page 425, in speaking of the covenants, relating to the payment of materialmen, this court say:

"This covenant, however, is inserted for an entirely different purpose from that of securing to the government the performance of the contract for the construction of the building. Inasmuch as neither the contractor nor his subcontractors can secure themselves by a mechanic's lien upon the proposed building, the government, solely for the protection of the latter, requires a covenant for the prompt payment of their claims, and the same security that it requires for the performance of the prin-

cipal contract. In this covenant the surety guarantees nothing to the principal obligee—the government—though the latter permits an action upon the bond for the benefit of the subcontractors. The covenant is made solely for their benefit.”

If made for their benefit, as this court holds in the case just quoted, then the rights and liabilities of the surety company are measured precisely as they would be if there were separate bonds with each one of the defendants in error, and the plaintiff in error cannot be held liable to the John Davis Company or any of the other defendants in error under any other conditions than where it would be held liable if they sued upon separate contracts and bonds, wherein the defendants in error were severally obligees.

In the case at bar, while the Federal Government did not annul the contract that Schott had made with it in July, 1908, it allowed the Schott Engineering Company to perform the work after the 1st day of January, 1909, and its officers were cognizant of the fact that Schott no longer, as an individual, was performing the contract. As long as the contract was being completed, however, in accordance with the terms that Schott had entered into with the Federal Government, no complaint was made.

The Schott Engineering Company completed the contract with the knowledge and acquiescence and approval of all of the defendants in error, and with the acquiescence also of the Federal Government.

The Circuit Court of Appeals in their opinion failed to make the distinction between completing the contract with the Federal Government and the rights of materialmen under the contract, that is outlined in the decision just quoted from this court and in the other Federal cases to which we have referred.

On and after the 2nd day of January, 1909, then, the Schott Engineering Company became a new principal in the contract, with the several defendants in error. That was the finding of fact of the trial court and it is in harmony with the decision of this court in the case of *Mills v. Dow*, 133 U. S., 423. In that case, one Mills had a contract for the building of the Boston & Mystic Valley Railroad Company's railroad bed, bridges, etc. He subcontracted some of this work to Hall and Burgess, Ellis and Savage. Later he assigned his contract to Dow and Pratt. At the time of his assignment of the contract, there was due to the subcontractors, \$11,048.08. In the assignment Dow & Pratt assumed said contract as does the Schott Engineering Company here, and also agreed to save Mills harmless from any and all liability, etc., as does the Schott Engineering Company hold Schott free of any liability in the premises. There were other conditions in the contract that seemed to indicate that Dow & Pratt were acting for the railroad company and that they were not intending to obligate themselves personally in the assignment. Suit was finally brought against them on the assignment, to determine their liability in the premises, and the court, in speaking of the assignment and the question as to whether they were principals or not, on page 432, said:

"By the instrument in question, the defendants took the place of the plaintiff, and became, after the instrument was executed, principals in the work of constructing the railroad; and their acceptance of the assignment and the conditions preceding it included the subcontracts and what was due and to become due upon them. The contract is not merely one to indemnify the plaintiff from damage arising out of his liability, but is an agreement to assume his contracts and to discharge him from his liability."

It is not denied that the assignment agreement from

Schott to the Schott Engineering Company provided that the Schott Engineering Company should assume the contract of Schott and should hold him harmless from liability. As is shown by Judge Sanborn in his findings of fact, the creation of the Schott Engineering Company and the transfer of the contract in question was brought about by the John Davis Company, and the John Davis Company, after the 2nd day of January, 1909, never had any business dealings with Schott as an individual. All of its business transactions were had with the Schott Engineering Company, and a statement of accounts between the John Davis Company and the Schott Engineering Company was had during the year 1909-1910, as shown in the findings of fact by Judge Sanborn, and a balance struck, which included all of the items that now are sought by defendant in error, the John Davis Company to recover from the Illinois Surety Company.

There is no privity of contract between Schott and those furnishing material to the Schott Engineering Company. In other words, the assignment severed all relations that the assignor had touching the contract in question and relieved him from any liability in the premises, and the assignee, the Schott Engineering Company, in this case, assumed all the rights and liabilities of the contract. A person furnishing material to such an assignee, can look to it and it alone, for his pay.

This question is clearly stated in the case of *Board of Education of City of St. Louis v. United States Fidelity & Guaranty Co.*, 134 Southwestern Rep., p. 18. There was a suit on a building bond executed under the statute, relating to public buildings in the State of Missouri. It appears that the Board of Education of the City of St. Louis contracted with E. Kohlbry and A. De Lane in a copartnership, doing business under the firm name

the National Engineering & Construction Company, to install the heating and ventilating equipment of the Baden public school building in the City of St. Louis, and the United States Fidelity & Guaranty Company became surety on their bond in the sum of \$5,375. The bond was executed in accordance with the statute in that state, which provided practically the same as the Federal statute under consideration in this case, as to paying for labor and material.

Kohlbray and De Laney did not perform their undertaking, but a corporation, the Advance Engineering & Construction Company did so. There was no proof in the case showing that the Advance Engineering & Construction Company, the corporation, had any contractual relations with the copartnership of Kohlbray and De Laney or with the Board of Education. The Philip Carey Company furnished and installed the covering for the steam pipes, which is a parcel of the heating apparatus of the Baden school building, under a contract with the Advance Engineering & Construction Company, for which it was to receive the sum of \$1,200. The Advance Engineering & Construction Company became insolvent and failed to pay for the material and labor that went into the construction of the building, as furnished by the Philip Carey Company. The Philip Carey Company, as does the John Davis Company here, sought to recover on the bond that was executed, guaranteeing the performance of the contract by Kohlbray and De Laney, copartners, claiming that, inasmuch as the bond provided for the payment of material and labor, that went into the construction of the building, that the bond was broad enough to cover that, although it furnished the material to the Advance Engineering & Construction Company, which performed the undertaking of Kohlbray

and De Laney, after they had failed to do so. The court, on pages 19, 20 and 21 say:

"It is argued here that notwithstanding the fact that there was no contract on the part of the Advance Engineering & Construction Company, which installed the heating and ventilating apparatus, and the principal obligor in the bond, Kohlbry & De Laney, whose contract was assured thereby, and notwithstanding there was no contract between the Advance Engineering & Construction Company or relator, the Philip Carey Company, with the Board of Education, to perform the task contracted for and omitted by Kohlbry & De Laney, the court erred in its judgment, for the reason it conclusively appears the material furnished and labor performed by relator entered into the construction of the school building. The bond in suit is a statutory obligation executed by the authority of and in accordance with Sections 6761, 6762, Rev. St. 1899 (Ann. St. 1906, p. 3328), and there can be no doubt of the proposition that by its execution these statutes became part and parcel of the obligation assumed by the surety. *State ex rel. v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 212, 50 S. W., 321. But, after conceding the proposition suggested, we have been unable to discover anything in the sections of the statute when read together which extends the obligation of the bond beyond its terms to include the debt of a person for materials and labor furnished to one who is not an obligor in the bond such as the contractor or in some relation of privity with him such as a subcontractor under him, unless it be in the case of a materialman or laborer furnishing material or labor to either the contractor or subcontractor. That the Advance Engineering & Construction Company to whom relator furnished the material and labor is neither the contractor, the performance of whose obligation is vouchsafed in the bond, nor a subcontractor under the original contractors, Kohlbry & De Laney, is conceded, and the case concedes, too, there is no contractual relation whatever between the board of education and the Advance Engineering & Construction Company, with whom relator contracted his debt, for no such

relation between the board of education and the Advance Engineering & Construction Company was either shown or sought to be shown in the proof. This being true, it is obvious that though relator furnished the material and labor for covering the pipes at the instance of the Advance Engineering & Construction Company, it is not to be regarded as either a materialman or laborer in the eye of the law, for the reason the essential privity of contract between its debtor and the owner of the building or original contractor is absent. Though a surety is regarded as a favorite of the law and the obligation of suretyship in its application to concrete facts is, therefore, considered *strictissimi juris*, the suretyship contract itself is, nevertheless, interpreted and construed in accord with the identical rules which obtain with respect to other undertakings. In other words, the terms employed in the obligation are to be given a reasonable interpretation according to the intent of the parties as disclosed by the instrument read in the light of surrounding circumstances and the purposes for which it was made. 27 Am. & Eng. Ency. of Law (2d Ed.), 450; Brandt on Suretyship (3d Ed.), 107; *Beers v. Wolf*, 116 Mo., 179, 22 S. W., 620; *Martin v. Whites*, 128 Mo. App., 117, 125, 106 S. W., 608. The contract between the Board of Education and Kohlbry & De Laney, of course, is to be read together with the bond executed by defendant surety for its faithful performance. These two instruments with the statutes under which the bond was executed contain the entire obligation of suretyship now in judgment.

* * * *

To hold this defendant to answer as surety for the unpaid debt contracted by the Advance Engineering & Construction Company would utterly disregard the precept of natural justice which obtains as a fundamental principle in the undertaking of suretyship. There inheres in every contract of suretyship the just, equitable principle which affords to the surety a right to be indemnified by his principal for whatever sum he has paid out in discharge of the principal's obligation. *Reissaus v. Whites*, 128 Mo. App., 135, 106 S. W., 603. It is

obvious that, if this defendant were required to compensate the relator for the indebtedness of the Advance Engineering & Construction Company, it would be without recourse for indemnity against its principal, Kohlbry & De Laney, because that co-partnership is in no manner privy to the relator's claim, and, in the absence of such privity, there is naught upon which the equitable principle, affording indemnity may operate. We approve the conclusion of the trial court to the effect relator is not entitled to recover on the bond in the absence of proof that it furnished material and labor to some one in privity of contract with the original contractors, Kohlbry & De Laney, the principal obligor in the bond."

Bd. of Education v. U. S. Fidelity & Guaranty Co., 134 Southwestern Rep., p. 18.

The principles of law announced in the Missouri case just quoted are in harmony with the repeated decisions of this court. That decision furnishes an absolute bar to the right of recovery of any of the defendants in error in this case. In every decision that has been rendered by this Honorable Court, holding the contractor liable for labor or materials under the statute, involved in this case, it has been for some one in privity of contract with him. The decision of the Circuit Court of Appeals destroys this principle of law that has been recognized in more than a hundred cases that have arisen under the statute, relating to the construction of public buildings for the Federal Government.

The undisputed fact in this case is that on the 2nd day of January, 1909, Schott ceased to have anything to do personally with the carrying out of the contract that he had made, that is now under consideration. His dropping out of the completion of the contract was as full and effective as though he had died on that date or had become physically or mentally incapacitated.

Had any one of these three contingencies happened instead of the assignment under consideration, the plaintiff in error would have had an opportunity of determining whether it would complete the contract or whether to decline and let the Federal Government readvertise and complete it. The record does not show what the result would have been in any of these contingencies, but these are rights that were reserved for plaintiff in error on its bond, under the contingencies suggested.

Now, the Illinois Surety Company never knew of the negotiations that were being carried on by Schott, its principal, with the John Davis Company and other creditors, looking to the formation of the Schott Engineering Company and the assignment of all his interests, property and assets to that company.

The first knowledge that it had was when the bankruptcy court directed the receiver of the Schott Engineering Company to notify the materialmen of the situation and get their advice as to whether the receiver of the Schott Engineering Company should complete the contract.

The Illinois Surety Company took the earliest opportunity to disavow any connection with or any responsibility for the Schott Engineering Company and has maintained that position from that time to the present. Had the Illinois Surety Company been called upon to expend any money on this contract, under any one of the three contingencies above noted, it would have had the right of indemnifying itself against Schott, with the property and assets that he had in his possession before the assignment was made, so that if Schott had failed to complete the contract, by reason of death or by reason of being physically or mentally incapacitated, the Illinois Surety Company could have

taken care of itself and reimbursed itself out of the property and assets he had.

The assignment that was brought about by the John Davis Company took all of his property and assets, without the knowledge of the Illinois Surety Company, and transferred same to the Schott Engineering Company, so that when the Illinois Surety Company is called upon now, to defend these cases, it has no recourse to reimburse itself from Schott, for any claim that might be established against it for material or labor that went into the building of the Naval Training Station at North Chicago.

Plaintiff in error executed its bond in question, because of its confidence in the ability of Schott to complete his contract. Had it known that Schott was not to personally stand for the completion of the contract and the payment of defendants in error, it would, of course, have declined to execute its bond. In other words, in writing the bond that it did for Schott, it selected the person whom it was willing to be responsible for and it was entitled to have the character, credit and substance of Schott retained and interposed between it and any liability on the contract. The assignment that was brought about, in the manner already indicated, removed the character, credit and substance of Schott from the contract and substituted another person, viz.: the Schott Engineering Company.

In the case of *Arkansas Smelting Co. v. The Belden Co.*, 127 U. S. Reports, at page 387, Mr. Justice Gray said:

"But every one has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denham 'you have the right to the benefit you anticipate, from the

character, credit and substance of the party with whom you contract.' ”

This protection that this Honorable Court says surrounds every surety company that executes a bond for a contractor for the performance of a building contract, under the construction of the statute, by the Circuit Court of Appeals, has been taken away. No surety company can survive, if the construction of the statute by the Circuit Court of Appeals is to be the rule of law hereafter, that is to govern in all the public building contracts. The same provision of law relating to labor and materialmen, that we find in the statute under consideration, is found in almost every state in the union, and if this broad and defenseless construction of the statute by the Circuit Court of Appeals is to be maintained, the fundamental principles of law that all surety companies have looked to, to protect themselves as bondsmen, will be wiped away.

To hold to the construction of the statute for which we contend and which, as we have already shown, this court has repeatedly held, works no hardship to an honest materialman or laborer.

These defendants in error were not required to furnish material to the Schott Engineering Company. It was purely optional with them whether they would do so or not. It would have been no breach of contract on their part, to have refused to furnish this corporation material to be used in the construction of the building in question, and none of the defendants in error would have suffered any damages by standing on their legal rights and refusing to furnish the material. They knew, after the 2nd day of January, 1909, that Schott was no longer personally interested in the completion of the building at North Chicago. They knew that a corpo-

ration had been organized, through the instrumentality of the John Davis Company and other creditors of Schott, and that Schott had assigned all of his interests in the contract in question to that corporation. Before they furnished any material to the Schott Engineering Company they could have at least, communicated with plaintiff in error to know whether it had knowledge of the assignment from Schott to the Schott Engineering Company and whether it approved of the same, and would stand surety for the new principal.

The John Davis Company, without a word to plaintiff in error, furnished all the material that it was called upon by the Schott Engineering Company to furnish, and during all of the life of the Schott Engineering Company, as we have already shown, treated it as a new principal in the contract.

We submit that under the facts and law here shown, relating to this company, that the Circuit Court of Appeals erred in rendering a judgment against plaintiff in error and that said judgment should be reversed and this court should find that plaintiff in error is not liable in any sum whatever to that company.

V.

EMMA E. BAIRSTOW, GEORGE H. BAIRSTOW,
JESSIE B. BLACKMER, EXECUTORS OF THE
WILL OF F. BAIRSTOW, DECEASED, CLAIM.

The trial court, in its findings of fact, touching the above claim, said:

"Between September 15, 1909, and December 30th, 1909, F. Bairstow sold to the Engineering Company (for use under the contract above mentioned), certain material amounting to \$1,143.75, upon which \$515.68 was paid, leaving a balance of \$628.07.

Bairstow received the receiver's letter and replied thereto and sold material to the receiver for this work. After this material was furnished, F. Bairstow died and Emma E. Bairstow, George H. Bairstow, and Jessie B. Blackmer were appointed executors of his will and are now acting as such." (Tr. of Rec., 519.)

The evidence upon which the trial court made the findings of fact above quoted, will be found on pages 332 to 361, inclusive, of the Transcript of the Record. The trial court dismissed the above claim against plaintiff in error and entered a judgment in its favor for costs, etc.

The Circuit Court of Appeals reversed the judgment of the trial court and entered judgment in that court for the sum of \$514.91. The material for which the above claim was made, was not furnished to Schott. Schott had no interest in it whatever. It was furnished to his assignee, the Schott Engineering Company.

Under the findings of fact, if the well known principles of law that govern such cases, are to prevail, but one judgment should be rendered, and that is, the judgment that was rendered by the trial court.

We respectfully ask this Honorable Court to reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial court on this claim.

VI.

THE STANDARD UNDERGROUND CABLE COMPANY, A CORPORATION, CLAIM.

The findings of fact by the trial court in the above case are as follows:

"The Standard Underground Cable Company, a corporation, and one of the use plaintiffs, sold and delivered to W. H. Schott in 1908, for use under his contract with the Government, a quantity of electrical cables, in the amount of \$6,713.09, of which amount, after allowing all credits and payments thereon, the balance of \$2,563.16 remained, overdue at the time of the commencement of this suit, and no part of the same has been paid. The said materials were used in the prosecution of the work under the Schott contract with the Government.

The Standard Underground Cable Company sold and delivered to the Schott Engineering Company in 1909, for use under the said Schott contract with the Government, certain other electrical cables and materials in the amount of \$187.54, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The said cables and materials were shipped consigned to W. H. Schott at Naval Training Station in accordance with the order of the Schott Engineering Company and were used in the prosecution of the work under the said Schott contract with the Government. When the Cable Company shipped its material in 1909 it had knowledge of the fact of the assignment from Schott to the Schott Engineering Company. The order of the Schott Engineering Company for the material that was sold and delivered in 1909, was an order from said Schott Engineering Company, which was delivered to said Standard Underground Cable Company, through J. R. Wiley, its Western Manager, which order was forwarded to the home office of Standard Underground Cable Company at Pittsburgh, Pennsylvania, with the following letter from said Wiley:

'Standard Underground Cable Co.

Chicago Office Dept.

To General Sales Department.

Referring to yours of

Subject: Schott Engineering Co.

Chicago, Nov. 18, 1909.

File No.

Chicago, Ill.

Gentlemen:

W. H. Schott C-5181.

We hand you enclosed Chicago Order No. 5181 in the name of the Schott Engineering Co. for quick shipment, as set forth in the order and we give you in explanation the information that this lot of material is required to finish up the Schott job at the Naval Training Station, North Chicago, Ill. You will find attached to our order an explanatory letter from our customer informing us that this little lot of material need not be inspected at your factory in the usual way, but will be required to meet the same requirements and inspection at destination. We are not positive that any detail tests will be made upon the material after it arrives at destination as the chances are as soon as it arrives it will be grabbed and connected up by the contractor.

Referring now to overdue account of W. H. Schott. Mr. Schott tells us that he remitted \$1,000 several days ago and he tells us also that he has written you a letter explaining that by the first of the year he will have remitted the balance of the account and inasmuch as the Schott Engineering Co. assumed all of the business, rights, titles, etc., of W. H. Schott, you will note the order comes to us and we have made out our order in the name of the Schott Engineering Company.

We do not hesitate to recommend that you go ahead and bill this little order as promptly as possible and we are quite sure that the account will be fully settled in accordance with Mr. Schott's recent advices to our Treasurer.

The point we want to make in this transaction is that in order to finish up the old job they must have this new material and they must have it just as quickly as it is possible to get it to them.

We imagine that our Treasurer will be somewhat relieved by the recent remittance of \$1,000 from Mr. Schott and as already explained we have an idea that the whole account will be eventually settled to your entire satisfaction.

Very respectfully,

STANDARD UNDERGROUND CABLE CO.

Per J. R. WILEY,
Western Manager.

W-K Enc.

After the receipt of this letter the electrical cables and material covered by said order in said amount of \$187.54 were shipped by said Cable Company to the Schott Engineering Company. The Cable Company filed its claim in the bankruptcy of the Schott Engineering Company for the total amount of its claim in this case, consisting of the two amounts of \$187.54 and \$2,563.16, and also filed its claim in the bankruptcy of W. H. Schott for the amount of its claim for materials sold and delivered in 1908, namely, \$2,563.16." (Tr. of Rec., 524-526.)

The evidence upon which the trial court made the foregoing findings of fact will be found on pages 265 to 289 inclusive, Transcript of Record.

The trial court entered a judgment against plaintiff in error on this claim for \$2,880.69; being the materials furnished before the assignment of Schott to the Schott Engineering Company, and entered a judgment for the plaintiff in error on the claim, of \$187.54, for materials that were furnished on the contract to the Schott Engineering Company during the year 1909. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed this judgment of the trial court and entered a judgment against plaintiff in error for \$2,255.09. (Tr. of Rec., 591.)

We respectfully insist that the Circuit Court of Appeals erred in entering any judgment whatever against plaintiff in error, and we also respectfully insist that the trial judge erred in not finding for plaintiff in er-

ror on the entire claim. That court made the same division on this claim that he did on all of the claims that were considered and determined by him, viz.: any material furnished before the 2nd day of January, 1909, and unpaid, was charged against the Illinois Surety Company and any material furnished the Schott Engineering Company after that date—the claim for the same was dismissed by that court.

The trial court in this case, as in the Davis case, failed to make the distinction that is made in the case of *Reissaus v. Whites*, 128 Mo. App., 135-45, and the other cases cited in our brief, in support of our contention, that the judgment against plaintiff in error for the John Davis Company should be reversed.

It is apparent from the findings of fact by the trial judge that when the order of the Schott Engineering Company in 1909 was received by defendant in error, for material to complete the Schott contract with the Government, that defendant in error was fully advised of the assignment of the contract from Schott to the Schott Engineering Company, and the date when the assignment was made, the terms and conditions of the assignment and that Schott was relieved from any responsibility or liability in the premises.

“Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.”

Wood v. Carpenter, 101 U. S. Rep., 135, 141.

The letter that is quoted in the findings of the trial judge, establishes two facts:

1. That the material that the Schott Engineering Company was calling for from the defendant in error,

was a part of a general contract for material that defendant in error had with Schott individually.

2. It was advised that the order came, not from Schott personally, but from the Schott Engineering Company, and that the Schott Engineering Company had assumed all of the business rights, dealings, etc., of W. H. Schott.

Under the authority of *Wood v. Carpenter, supra*, then, before this order was filled, defendant in error had full knowledge of the assignment from Schott to the Schott Engineering Company, in all of its details, and by this, recognized the Schott Engineering Company and accepted the order and forwarded the goods to complete the contract, as the findings of the trial court show that it did, accepting the Schott Engineering Company as a new principal, and thereby releasing the plaintiff in error.

We respectfully call the attention of your Honors to the cases on this point that we have already cited, in the discussion of the John Davis Company case, and the point that we specifically desire to impress upon your Honors is that when defendant in error honored the order of the Schott Engineering Company, that it changed its relations with the plaintiff in error, which was the bondsman of Schott, and thereby wholly discharged it from any responsibility whatever.

It could have declined to recognize the Schott Engineering Company and have refused to furnish the materials to any other person than to Schott, but with the knowledge that it had, it accepted that assignee, as the new principal in the bond, and under all of the authorities that we have quoted, plaintiff in error cannot be held liable.

Counsel for defendant in error, in discussing the question of the material that had been furnished, prior to the 2nd day of January, 1909, to Schott, personally argued in the Circuit Court of Appeals that each separate order that was filled by defendant in error was a separate and executed contract when the material was furnished. The transfer and recognition of the Schott Engineering Company after that date, could not affect the right of defendant in error to recover for materials furnished at the several times, prior to that date, to Schott personally. This argument is plausible but not sound.

The contract that Schott entered into in July, 1908, was with the Government, to complete and build a building at North Chicago and with the materialmen, to pay for all the materials furnished him that went into the construction of the building in question. His contract with each materialman necessarily related to the materials for the construction and completion of the building in question, and it could no more be divided into parts than could the contract with the Federal Government be divided into separate parts, and when the foundation of the building was completed, Schott and the Government could call that a separate and completed contract.

Each materialman that was furnishing materials, from the very necessity of the situation, was governed and controlled by the contract that related to the completion of the building under contract; so that defendant in error, in bringing suit upon the bond of plaintiff in error, by the very act of bringing the suit, confirms our contention that there was but one contract with the defendant in error, for materials that were furnished for this building, so far as plaintiff in error is concerned.

Now, we have already shown that from the letters that passed between defendant in error and its Chicago agent, that the materials furnished in 1909, was part and parcel of the contract under which the previous materials had been furnished. Plaintiff in error had executed its bond for the faithful performance of Schott and not otherwise. When defendant in error was urged by its Chicago agent, to honor the order for materials by the Schott Engineering Company, it was optional with it whether it would decline to honor an order from another entity than that of Schott, and thus release plaintiff in error upon its bond, or fill the order and look to the new principal.

For the reasons assigned in the letter or for other reasons that were potent with defendant in error, it honored the order of the Schott Engineering Company and thereby accepted it as a new principal.

Under all of the authorities that we have heretofore cited in this brief and argument, this act of the defendant in error released plaintiff in error, and it released plaintiff in error from what had been furnished to Schott as well as to what it furnished to the new principal, the Schott Engineering Company, for the reason that when it accepted the Schott Engineering Company as a new principal, it abrogated its contract and bond with Schott, and plaintiff in error could not be held for what it furnished to the Schott Engineering Company, because it was a stranger to that company.

In the case of *Reese v. United States*, 9 Wall., on page 21, in the opinion by Justice Field, this court said:

"Any change in the contract, on which they are sureties, made by the principal parties to it, without their assent, discharges them, and for obvious reasons. When the change is made, they are not bound by the contract in its original form, for that

has ceased to exist: they are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

This rule of law was ignored in the judgment of the Circuit Court of Appeals.

In addition to the considerations which plaintiff in error have urged in the above cause, counsel desire to call your Honors' attention to the fact that after the Schott Engineering Company went into bankruptcy, the Standard Underground Cable Company filed its claim in the bankrupt court against the Schott Engineering Company for the total amount of its claim, consisting of the two items to which we have already referred, thereby expressly again, approving and adopting the assignment from Schott to the Schott Engineering Company.

In the case of the Universal Portland Cement Company claim, we have referred more at length to this subject, and respectfully refer your Honors to the authorities cited in support of plaintiff in error's contention on the Universal Portland Cement Company's claim. They have direct application here on this subject.

We, therefore, respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and to enter a judgment in favor of plaintiff in error.

VII.

GEORGE RACKY, DOING BUSINESS AS RACKY & SONS IRON WORKS, CLAIM.

The trial court in its findings of fact, relating to the above claim, held:

“George Racky, doing business as Racky & Sons Iron Works, one of the use plaintiffs, in 1909, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, a certain lot of bolts and clamps, in the amount of \$389.55, which was overdue at the time of the commencement of this suit and no part of the same has been paid. The materials were used in the prosecution of the work under the contract of Schott with the Government.” (Tr. of Rec., 529.)

The evidence upon which this finding is predicated will be found on pages 315-17, Transcript of Record. The trial court found against the claimant's right of recovery and entered a judgment in favor of plaintiff in error. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed this judgment and entered a judgment against plaintiff in error in the sum of \$319.37. All of this material, as your Honors will observe, from the findings of the court, was furnished to the Schott Engineering Company during the years 1909-10. Schott had no interest in it whatever.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the trial court on this claim should be affirmed.

VIII.

D. E. GARRISON, JR., DOING BUSINESS AS GARRISON & COMPANY AND CORRUGATED BAR COMPANY, CLAIM.

The finding of fact of Judge Sanborn on the above claim is as follows:

"D. E. Garrison, Jr., doing business as D. E. Garrison & Company and Corrugated Bar Company, a corporation, one of the use plaintiffs, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, in October, 1909, corrugated bars in the amount of \$75.25, which was overdue at the time of the commencement of this suit and no part of the same has been paid. In accordance with the direction of the order, the materials were shipped by rail, consigned to W. H. Schott at the Naval Training Station at North Chicago. The materials were used in the prosecution of the work under the contract with the Government." (Tr. of Rec., 531-2.)

The evidence offered on the trial of this case, in support of this claim will be found on page 311 and top of page 312, Transcript of Record.

The trial judge rejected the claim and found a judgment in favor of the plaintiff in error. (Tr. of Rec., 50-1.)

The Circuit Court of Appeals reversed the judgment of the trial court and rendered a judgment in that court against plaintiff in error for the sum of \$61.69. (Tr. of Rec., 591.)

Defendant in error had no dealings whatever with Schott personally. The dealings were directly with the Schott Engineering Company and there was no thought, when the materials were being furnished and used by the

Schott Engineering Company, that either Schott or plaintiff in error should be held liable for the materials thus furnished. Indeed, we doubt if defendant in error knew that Schott had originally taken this contract or that plaintiff in error was on his bond. The fact is that the Schott Engineering Company, in the prosecution of the completion of this contract, dealt with these people as two principals deal with each other.

We respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and that the judgment of the trial court should be affirmed by this Honorable Court.

IX.

UNITED STATES EQUIPMENT COMPANY, A CORPORATION, CLAIM.

The trial court in its findings of fact, relating to the above claim, said:

"In September, 1908, the United States Equipment Company, a corporation, and one of the use plaintiffs, entered into an agreement with W. H. Schott, whereby said Equipment Company was to furnish certain cars, track and equipment for use by said Schott at the Naval Training Station in carrying out his contract with the Government, for a rental of \$42.82 per month, and the expense of loading said plant and freight on same to the Naval Training Station, and also freight for return of same to the Equipment Company, to be paid said Equipment Company by said Schott. Said cars, track and equipment were accordingly furnished in said month of September, 1908, by said Equipment Company to said Schott, and the same were used in the prosecution of the work under Schott's contract with the Government until the end of October, 1909, the use being the hauling of work and materials upon and about the grounds where the said construction work was in progress, same being used by Schott until January, 1909, and thereafter by the Schott Engineering Company, and the said cars, track and equipment were returned to the Equipment Company; the charges for loading and freight on the transportation of said cars, track and equipment to the Naval Training Station were paid, as was also the monthly rental to and including the month of June, 1909; the rentals thereafter in 1909, amounting to \$171.28, and the return freight, \$21.11, paid by the Equipment Company, were not paid to it, and same were overdue prior to the commencement of this suit, and no part thereof has been paid." (Tr. of Rec., 527.)

The trial court, under the state of facts here found,

dismissed said claim and entered judgment in favor of plaintiff in error. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed the judgment of the trial court and entered a judgment against plaintiff in error for the sum of \$157.73. (Tr. of Rec., 591.)

The trial court held that the rentals and freight for machinery furnished by the defendant in error, were not labor or materials of a character that entitled it to recover against the Illinois Surety Company. Conclusions of Law, p. 534.

With all due respect for the Circuit Court of Appeals, we respectfully insist that the judgment of the trial court is more in harmony with the weight of authority on this subject than that of the Circuit Court of Appeals.

The cars and track and equipment were all returned to the Equipment Company, as shown by the findings of fact of the trial court. Plaintiff in error might just as well be held for whatever was expended by Schott, in purchasing tools and machinery, with which to carry on his contract, as to charge him with rentals for the equipment that was returned to defendant in error.

In principle, there is no difference in requiring the Illinois Surety Company to be responsible for the rental of the cars and track and equipment that defendant in error furnished to the Schott Engineering Company and to Schott, for a stipulated rental than there would be to require it to pay some boarding house keeper for the board that was furnished to laborers who worked for Schott and the Schott Engineering Company, on the building in question.

The cases cited by the Circuit Court of Appeals, viz.: *American Surety Co. v. Lawrenceville Cement Co.*,

110 Fed., 717, and *City Trust, Safe Deposit & Surety Co. v. United States*, 147 Fed., 155, do not, as we read those cases, support the broad construction that has been placed upon this statute by the Circuit Court of Appeals on this question.

The cases that are referred to in the opinion of Judge Lacombe, in 147 Fed., *supra*, are more in harmony with the views on this subject, expressed by the trial court, and as it seems to us, are more in harmony with what is just and fair in the premises. The case of *Standard Oil Company v. Trust Company*, 21 App. D. C., 369 and *United States v. Fidelity & Deposit Company*, 86 App. Div., 475, sustain the views expressed by the trial judge in this case.

We, therefore, respectfully ask this Honorable Court to reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial court.

X.

THE ROEBLING CONSTRUCTION COMPANY, A CORPORATION, CLAIM.

The findings of fact by the trial court in the above case are as follows:

"The Roebling Construction Company, a corporation, and one of the use plaintiffs, in September and later in 1908, by contract with W. H. Schott, performed work in unloading a concrete mixer, and furnished to Schott, at the Naval Training Station, in the carrying out of his contract with the Government, water for the running and operation of the concrete mixer, and water for the running and operation of a certain steam ditcher. The said machines and water were used in the prosecution of the work under Schott's contract with the Government. The reasonable charge of \$8 for the unloading of said machine pursuant to said agreement was made by the Roebling Construction Company to Schott, and the reasonable charge for water for said mixer and the said ditcher in 1908, pursuant to said agreement, was made to Schott in the sum of \$65.55, which made a total of \$73.55 charges against Schott in 1908 by the Roebling Construction Company, which amount was overdue at the time of the commencement of this suit, and no part of the same has been paid.

The Roebling Construction Company in 1909 similarly furnished the Schott Engineering Company and charged to it for water in use of and in connection with said mixer the reasonable amount of \$53.04, and furnished use of sawmill on one occasion, for the reasonable charge of 56 cents, and also sold and delivered to the Schott Engineering Company, for use under the contract of Schott with the Government, gravel in the amount of \$44.55, which was used in the said work, making the total amount furnished the Schott Engineering Company, and used in the prosecution of the work under the Schott

contract with the Government, in 1909, \$99.13, which was overdue at the time of the commencement of this suit, and no part of the same has been paid." (Tr. of Rec., 527-28.)

The trial court allowed the claim for materials furnished before the 2nd day of January, 1909, and entered judgment against the plaintiff in error for the sum of \$82.72, and dismissed the claim for materials furnished after this date, and entered judgment on the same in favor of plaintiff in error. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed this judgment of the trial court and entered judgment in favor of the above named defendant, in the sum of \$141.63. (Tr. of Rec., 591.)

What we have said in discussing the Standard Underground Cable Company case and the John Davis Company case will apply with equal force to this case. We maintain that under the authorities that we have cited in this, our brief and argument, on the other claims, that plaintiff in error is not liable for any part of the claim of defendant in error.

We, therefore, respectfully ask this Honorable Court to reverse the judgment of the Circuit Court of Appeals and enter a judgment in favor of plaintiff in error on this claim.

XI.

WESTERN KIELY STEAM SPECIALTY COMPANY
CLAIM.

The trial court in its findings of fact, respecting this claim said:

"The Western Kiely Steam Specialty Company, a corporation, and one of the use plaintiffs, in November, 1909, sold and delivered to the Schott Engineering Company, for use under the Schott contract with the Government, a quantity of steam traps, in the amount of \$150, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the Schott contract with the Government. They were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the order of the Schott Engineering Company." (Tr. of Rec., 531.)

The evidence upon which the trial court found the facts, as above set forth, will be found on pages 312-313 of the Transcript of Record.

On the findings of fact, as above set forth, the trial court dismissed said claim and entered judgment for costs in favor of plaintiff in error. (Tr. of Rec., 550-551.)

The Circuit Court of Appeals reversed the judgment of trial court and entered judgment in that court against plaintiff in error for the sum of \$122.97. (Tr. of Rec., 591.)

This claim, like the others, is one furnished to the Schott Engineering Company. It has no relation whatever with the plaintiff in error.

We respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals on the above claim and to affirm the judgment of the trial court.

XII.

H. W. JOHNS-MANVILLE CO., A CORPORATION,
CLAIM.

The facts as found, respecting this claim, by the trial court, are as follows:

"The H. W. Johns-Manville Company, a corporation, and one of the use plaintiffs, in June, and thereafter and until December, 1909, sold and delivered to the Schott Engineering Company, for use under the contract of Schott with the Government, certain quantities of electrical materials, consisting of primary and secondary boxes, etc., in the amount of \$1,147.80, upon which \$466.30 was paid in December, 1909, leaving the balance of \$681.50 overdue and unpaid at the time of the commencement of this suit, and no part of said balance has been paid. The materials were used in the prosecution of the work under the Schott contract with the Government. They were shipped consigned to W. H. Schott at the Naval Training Station, in accordance with the orders given by the Schott Engineering Company. The H. W. Johns-Manville Company received the letter sent out by the receiver, and sold material to it for the completion of the work." (Tr. of Rec., 531.)

The evidence upon which the trial court found the above facts will be found on pages 362 to 369 inclusive, Transcript of Record.

On the findings of fact, as above set forth, the trial court dismissed said claim and entered a judgment for costs in favor of plaintiff in error. (Tr. of Rec., 550-1.)

The Circuit Court of Appeals reversed the judgment of the trial court and entered judgment in that court against plaintiff in error for the sum of \$558.70. (Tr. of Rec., 591.)

The only party that the claimant ever dealt with was the Schott Engineering Company. The Illinois Surety Company, as we have heretofore shown, did not bond that company and disclaimed any responsibility for it.

We respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals on the above claim and to affirm the judgment of the trial court.

XIII.

THE STEBBINS HARDWARE COMPANY CLAIM.

The findings of fact on this claim by the trial judge are as follows:

"The Stebbins Hardware Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in 1909, for use under the Schott contract with the Government, materials in the amount of \$171.15, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the contract with the Government." (Tr. of Rec., 531.)

The testimony upon which Judge Sanborn made his findings of fact in the above case is found on page 310. There is no pretense that The Stebbins Hardware Company ever had any dealing with Schott, the principal in the bond of the Illinois Surety Company.

The trial judge entered judgment in favor of the plaintiff in error on this claim. This judgment was reversed by the Circuit Court of Appeals and a judgment entered in favor of this corporation in the sum of \$140.32. (Tr. of Rec., 591.)

We respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and affirm that of Judge Sanborn in this case.

XIV.

COMMONWEALTH EDISON COMPANY, A CORPORATION, CLAIM.

The findings of fact by the trial court in this case are as follows:

"The Commonwealth Edison Company, a corporation, and one of the use plaintiffs, in December, 1909, sold and delivered certain conductors and cables to the Schott Engineering Company for use under the Schott contract with the Government, in the amount of \$74.04, which was overdue at the time of the commencement of this suit and no part of the same has been paid. The materials were shipped, consigned to W. H. Schott, as directed by the order, and were used in the prosecution of the work under the Schott contract with the Government." (Tr. of Rec., 528.)

This company dealt with the Schott Engineering Company *direct*, without any thought of holding plaintiff in error responsible on the Schott contract, with the Federal Government.

The trial court found against the claim and entered judgment in favor of plaintiff in error. (Tr. of Rec., 550.)

This judgment of the trial court was reversed by the Circuit Court of Appeals and judgment rendered against the Illinois Surety Company in favor of the Commonwealth Edison Company in the sum of \$60.70. (Tr. of Rec., 591.)

We respectfully submit the judgment of the Circuit Court of Appeals should be reversed and the judgment of the trial court affirmed in this case.

XV.

JAMES B. CLOW & SONS CLAIM.

The Circuit Court of Appeals entered a judgment against plaintiff in error for the use of James B. Clow & Sons in the sum of \$1,652.39. (Tr. of Rec., 591.) The findings of fact by the trial court, Judge Sanborn, relating to the claim of James B. Clow & Sons is as follows:

“Subsequent to January 2, 1909, and during the year 1909, the plaintiff, James B. Clow & Sons, delivered and sold material amounting to \$2,015.54. All of the materials sold and delivered by James B. Clow & Sons were upon orders received from the Schott Engineering Company, and were charged by James B. Clow & Sons upon its books to the Schott Engineering Company. All of said materials were used in the completion of the Naval Training Station at North Chicago, Illinois, in connection with which the defendant, William H. Schott, gave the bond upon which suit has herein been brought. Said materials were all furnished by the plaintiff, James B. Clow & Sons, during the year 1909, and the entire amount thereof is unpaid, leaving a balance of \$2,015.54.” (Tr. of Rec., 532.)

The testimony upon which that finding is made by the trial judge will be found on pages 305 to 310, Transcript of Record. The evidence shows just what the finding of fact indicates by Judge Sanborn, that the dealing was entirely with the Schott Engineering Company. Mr. Schott personally, had no more to do with this claim of James B. Clow & Sons than any stranger.

The trial judge, after the finding of fact, as herein set forth, entered judgment against Clow & Sons in favor of plaintiff in error, and we respectfully submit that the Circuit Court of Appeals erred in reversing Judge Sanborn on this claim, and ask your Honors to so find.

XVI.

SCOTT VALVE COMPANY, A CORPORATION,
CLAIM.

The trial court in its findings of fact, respecting this claim, said:

"The Scott Valve Company, a corporation, and one of the use plaintiffs, in June, and from time to time thereafter, until December, 1909, sold and delivered for use under the contract of Schott with the Government, to the Schott Engineering Company, a quantity of valves in the amount of \$365.14, which was overdue at the time of the commencement of this suit and no part of the same has been paid. These materials were used in the prosecution of the work under the Schott contract with the Government. The materials were shipped from time to time, consigned to W. H. Schott at the Naval Training Station, in accordance with the orders of the Schott Engineering Company." (Tr. of Rec., 530-1.)

The evidence upon which the court found the facts as above set forth, will be found on pages 320-25 of the Transcript of Record.

The trial court dismissed this claim and entered a judgment for costs in favor of plaintiff in error. (Tr. of Rec., 550-1.)

This judgment the Circuit Court of Appeals reversed and entered a judgment in that court against plaintiff in error for the sum of \$229.35. (Tr. of Rec., 591.)

The Illinois Surety Company, plaintiff in error, had no relation, either directly or remotely on this claim. We respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals on the above claim and to affirm the judgment of the trial court.

XVII.

ELECTRIC APPLIANCE COMPANY CLAIM.

Judge Sanborn, the trial judge, in his findings of fact, respecting this claim, said:

"The Electric Appliance Company, a corporation, and one of the use plaintiffs, sold and delivered to the Schott Engineering Company in 1909, and prior to January 15, 1910, a quantity of materials for use in the prosecution of the work under the Schott contract with the Government, amounting to the sum of \$565.28, which was overdue at the time of the commencement of this suit, and no part of the same has been paid. The materials were used in the prosecution of the work under the contract with the Government." (Tr. of Rec., 529.)

The evidence upon which the foregoing finding was made by the trial court is found on pages 313-4, Transcript of Record.

The claim was dismissed by the trial court and a judgment entered against it in favor of the Illinois Surety Company, plaintiff in error, for costs.

The Circuit Court of Appeals reversed the trial court and entered judgment against plaintiff in error, in the sum of \$463.43. (Tr. of Rec., 591.) This was error, and we respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals on this claim and affirm the judgment of the trial court.

XVIII.

WESTERN ROOFING & SUPPLY COMPANY CLAIM.

The findings of fact by the trial court in the above case are as follows:

"Some time during the early fall of 1908 W. H. Schott entered into a written contract with the Western Roofing & Supply Company, hereinafter called the 'Supply Company,' by which the latter was to furnish and the former was to take all the pipe covering for the work in question. In this written contract a number of feet of the various sizes required was stated. The prices to be paid for this covering were also stated therein. The understanding between the parties to the contract was that Schott would forward orders for the material covered by the contract as the work progressed.

The first order which followed was mailed to the Supply Company in the month of August, 1908, and this order was signed by W. H. Schott on an order blank with the name 'W. H. Schott' printed at the top of same.

The above was the only order that was made by Schott personally. The hot water covering referred to in the above order was shipped in February, 1909, and aggregated the sum of \$979.

The court finds that all the other items of the Supply Company's claim were furnished in the year 1909 after the execution of the assignment contract on written orders of the Schott Engineering Company. After the organization of the corporation all of the orders were made out on printed order blanks which bore the printed name and signature of The Schott Engineering Company. On these blanks the words 'The Schott Engineering Company,' which followed the words 'Please deliver to,' were, with the exception of one order, erased by ink lines being drawn through them, and the name of W. H. Schott was written over those erased. These orders were

introduced in evidence by the Supply Company in support of its claim.

The following is a sample of the orders that were made by said Schott Engineering Company:

The Schott Engineering Company

315 Dearborn Street, Chicago.

Chicago, July 13th, 1909 Requisition No. 4218.

Messrs. Western Roofing & Supply Co.,

Address

Please ship to The Schott Eng. Co. W. H. Schott,
North Chicago, Ill.

Caré Naval Station.

Via C. & N. W. Ry.

20# Pate.

100 yds. 7 oz. canvas for covering fittings.

Deliver no invoices to employees. Mail same to
315 Dearborn Street, with Bill of Lading.

Will not be responsible for goods delivered without requisition.

Always put this requisition number on your invoice.

Will not pay for boxing, packing or cartage.

Goods not shipped check 'O' and ask instructions.

Make no back orders.

THE SCHOTT ENGINEERING COMPANY

By PAYNE.

All of the orders were identical in form with this one except as to the dates, number of orders and the materials ordered.

These orders from the Schott Engineering Company cover all the material and supplies involved in the Supply Company's claim, and for which it has not been paid. All of the material and supplies covered by these orders were charged on the books of the Supply Company to the Schott Engineering Company and not to W. H. Schott. Invoices were rendered from time to time as the materials were shipped to the Schott Engineering Company. One of these invoices was in the words and figures as follows:

'Form 243C 10M 10-12.

Private Exchange Harrison 5902. All accounts payable in Chicago or New York funds.

Western Roofing & Supply Company,
616 Fisher Building.

Order No.	Our No.	Chicago, Ill. 12-28-09
Reg. No. 4732	Charge No. 16178	All remittances
Car No.	Via C. & N. W.	must be made payable
F. O. B.		to order of the Company.

Shipped to W. H. Schott

C/o Naval Station, North Chicago

Sold to

Schott Engineering Company,
Chicago, Ill.

Subject to Sight Draft in 30 days without Further Notice. Interest Charged on Past due Accounts."

100 yds. 7 oz. canvas for pipe covering 14½c per yard
\$14.50.

Copy	Copy	Copy	Copy
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Notice. All contracts are subject to strikes, fires and other contingencies beyond our control.

All claims must be made immediately upon receipt of goods. Our responsibility ceases after delivery to transportation company; for any losses or breakage your recourse is upon them.'

All of the invoices of materials furnished by the Supply Company after January 1st, 1909, were identically the same as the above sample invoice, excepting the dates and the description of the material furnished and the order number.

The invoice for the first shipment arising out of the first order hereinabove stated amounting to \$979, was made out against W. H. Schott. The amount due for the shipment in February, 1909, on the order of Schott personally amounting to \$979, was paid for by the Schott Engineering Company in the year 1909. On May 24, 1909, the Supply Company wrote to the Schott Engineering Company the following letter:

'Western Roofing and Supply Company.
Chicago, May 24, 1909.

W. H. Schott Engineering Co.,
1100 American Trust Bldg., Chicago.

Gentlemen:—

We enclose herewith a statement of your account on which you will note we have entered credit for the material returned from car of February 16th.

We can use the funds to very good advantage, and as this matter has now been entirely adjusted we will thank you to kindly favor us with check in settlement of the February item less credit by return mail, and greatly oblige

Very respectfully,

WCI—O WESTERN ROOFING & SUPPLY Co.
2-16—5-11—\$2107.99.

The court further finds that this letter in making reference to 'your account' included the said item of \$979 for material ordered by Schott personally, as well as material that was shipped to the Schott Engineering Company on its orders. On June 7, 1909 the Supply Company again wrote to the Schott Engineering Company with reference to the item of \$979, which letter was as follows:

'Western Roofing and Supply Company.
Chicago, June 7th, 1909.

The Schott Engineering Co.,
American Trust Bldg., Chicago.

Gentlemen:—

As per your request we enclose herewith duplicate invoices covering our charge of February 16th on which we issued credit as of May 13th. We trust that all of this is correct and that we can now look for check in settlement of the account. We might say that we will authorize the deduction of 2 per cent. for cash on invoice of May 11th providing your check reaches us by the 10th.

Thanking you for past favors, we are

Very respectfully,

WESTERN ROOFING & SUPPLY Co.

W. C. IGNATIUS

Treas. & Asst. Mgr.'

WCI—O

Again on June 24, 1909, a letter was written by the Supply Company to the Schott Engineering Company, enclosing an invoice addressed to the Schott Engineering Company, in which charges were made for the said item of \$979, and also for other material shipped in 1909 to the Schott Engineering Company, in which invoice all of said items are charged against the said Schott Engineering Company.

The Supply Company received during the year 1909 a number of letters concerning the materials covered by the aforesaid contract, some of the letters being on letter heads bearing the name and signature of the Schott Engineering Company, others being on letter heads bearing the name and signature of W. H. Schott.

In August, 1909, the Schott Engineering Company paid by its check the item of \$979, which covered the only item of material and supplies that was ever ordered by Schott individually. This check also remitted for a number of items that were ordered by and charged to the Schott Engineering Company in May, 1909. This remittance settled and paid for in full the only bill for material and supplies that was ordered by Schott.

The court further finds that the Supply Company received the circular letter that was sent out by the receiver of the Schott Engineering Company on February 1st, 1910, hereinabove set forth, and that on February 8, 1910, the said Supply Company answered the same, advising the completion of the work by the receiver.

The court further finds that said Western Roofing & Supply Company, after February 8, 1910, received orders for materials from the Central Trust Company as receiver and trustee of the Schott Engineering Company, and furnished the same to such receiver and trustee, which were used in the completion of the work on said contract between Schott and the Government, and that said Supply Company was paid for the same by said receiver and trustee of said Schott Engineering Company.

The court further finds that the goods shipped on the first order have been paid for, and after al-

lowing all just claims and setoffs the balance due the Supply Company, not including interest, is \$4,873.41.

The court further finds that during the year 1909 correspondence was had between the Supply Company and the Schott Engineering Company in regard to delay in filling of orders and corrections of invoices, amounts of charges and credits and like matters, from all of which the court finds that said Supply Company dealt only with the Schott Engineering Company in making the sales or deliveries for which claim is made in this suit." (Tr. of Rec., 519-524.)

The evidence upon which the trial court made the foregoing findings of fact will be found on pages 409 to 499 inclusive, Transcript of Record.

The trial court on this finding of fact entered a judgment against claimant and in favor of plaintiff in error. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed the judgment of the trial court and entered a judgment against plaintiff in error and in favor of this claimant, in the sum of \$3,995.34. (Tr. of Rec., 591.)

The undisputed evidence, as found by the trial court is that all of the orders made and the materials furnished, that aggregated the amount claimed by the above named defendant in error in the trial court, were ordered and furnished, not only during the year 1909-1910, but were furnished on the order of the Schott Engineering Company and the goods were invoiced to the Schott Engineering Company.

The evidence is overwhelming and is in accordance with the findings of the trial judge, that Schott, as an individual, ceased to have any interest in the contract in question after the 2nd day of January, 1909. The books of the above named defendant, as shown by the

findings of the trial court, show that its transactions were not with Schott personally, but with the Schott Engineering Company. The statement of the accounts and letters that passed between them, as shown in the findings of fact by the trial judge, conclusively clinches the fact that the dealings between this defendant in error on all the materials furnished, was with the Schott Engineering Company,

The authorities that we have cited, in support of our contention that the judgment in favor of the John Davis Company, rendered by the Circuit Court of Appeals should be reversed, apply with great force in this case.

Under the findings of fact of the trial court, the above named defendant in error dealt only with the Schott Engineering Company, in making the sales or deliveries for which claim is made in this suit. This is the ultimate fact that is found by the trial judge, and of itself, is decisive of the rights of the parties.

We should leave this case here were it not for the fact that its counsel, both in the trial court and in the Circuit Court of Appeals insisted that a contract was made by Schott with it in the fall of 1908, by which it was to furnish to Schott all the pipe covering for the work in question, and argued from that, that plaintiff in error, as the surety for Schott, is liable for its claim made in this case.

It is apparent from a most cursory examination of the facts found by the trial judge in the case, that in furnishing the material and in receiving partial payment for the same, and in holding the correspondence that it did, that it was dealing solely with the Schott Engineering Company and that it had no thought at the time of the transactions, that resulted in the claim here made, that Schott was to be responsible or that

the Illinois Surety Company, as his bondsman would be required to pay. Indeed, as late as in January, 1910, when Federal Judge Landis, sitting in bankruptcy, required the receiver of the Schott Engineering Company to send out a communication to the creditors who had furnished material that was used in the construction of the Naval Training Station at North Chicago, that this defendant in error received the letter and was advised in the letter of the fact that the Illinois Surety Company, plaintiff in error, denied any responsibility for or connection with the Schott Engineering Company. As set forth in the findings of fact by the trial court, after the receipt of this letter, this defendant recommended that the contract be carried out by the receiver of the Schott Engineering Company and furnished material to help complete the contract.

This act is in entire harmony with all that took place during the year 1909 on materials furnished by it from orders of the Schott Engineering Company. It was only when its officers reached the conclusion that the assets of the Schott Engineering Company would not be sufficient to pay 100 cents on the dollar, that the liability of plaintiff in error was claimed.

In the trial of this cause, in the Circuit Court of Appeals, counsel for this defendant in error made an elaborate argument before the court, to show that the trial judge was in error in his findings of fact, and quite likely, counsel will follow the same tactics in this Honorable Court.

We have no fear that if the court should look into the evidence, to determine the rights of this defendant in error, that the conclusions reached would be different from that of the trial court, but we do not feel warranted in discussing the evidence, where the trial court has made a finding of fact.

This court say in the case of *Dower v. Richards*, 151 U. S., page 658, on page 666:

"No point has been more repeatedly and authoritatively settled than that this court will not upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."

To the same effect is the case of *Behn v. Campbell*, 205 U. S., 403-7; *Pacific Metal Works v. California Canneries Co.*, 164 Fed., 980; *Continental Gin Co. v. Murray Co.*, 162 Fed., 873.

Counsel for this defendant in error assume that there was a binding contract in the fall of 1908 between defendant in error and Schott, under which it was to furnish to him all the pipe covering for the work in question, and then argue that there is no novation and that these written orders that were received from the Schott Engineering Company and that were honored by it, are orders that were made under this blanket contract with Schott in 1908.

Schott made one order as shown by the findings of fact by the trial judge, in 1908, which was filled by defendant in error in February, 1909, that aggregated in amount \$979. This item the trial court has found was paid, and that the amount claimed to be due defendant in error at the time this case was being heard by the trial court aggregated \$4,873.41, and were furnished during the year 1909 to the Schott Engineering Company.

There is no finding of fact that any of the orders that were given by the Schott Engineering Company and that were honored by defendant in error, that go to make up this claim, were made under the so-called blanket contract of Schott.

There is no novation in this case; there could be none, because on the 2nd day of January, 1909, Schott di-

vested himself of all interest in the contract with the Government and from that time on, gave no orders for pipe covering or any other material. As is shown by the findings of fact, no material was to be shipped by defendant in error to Schott, unless upon his order, and as we have already shown, no order, aside from the one above mentioned, was ever made by Schott.

Now, when the Schott Engineering Company ordered some pipe covering from defendant in error, if it proposed to hold Mr. Schott and his bondsman for the order, that was the time for it to have made inquiries as to whether the order was an independent order from the Schott Engineering Company, an entirely different entity from that of Mr. Schott, or whether it was an order where it was to look to Schott and his bondsman for its pay, if it complied with the order. There was nothing compulsory in its furnishing material on an order from the Schott Engineering Company; it was entirely free to decline or to accept the order. If it accepted it and furnished the material, it was incumbent upon it, on good business principles, to know that it was sold and shipped to a responsible party, and if it was shipped on the idea that the plaintiff in error would be held as security, for the payment of the shipment, it should have made inquiries as to whether the Schott Engineering Company was another name for Schott. It could not assume that and hold the plaintiff in error responsible.

"Whatever is notice enough to excite attention is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it."

Wood v. Carpenter, 101 U. S., 141.

Paxson v. Brown, 61 Fed., 883.

29 Cyc., pp. 1114-1115.

"The law will not allow a man to shut his eyes when his ignorance is to benefit himself at the expense of another when he would have had them open and inquiring had the consequences of his ignorance been detrimental to himself and advantageous to the other."

C. R. I. & P. R. R. v. Kennedy, 70 Ill., 350, 362.
Marks v. Gartside, 16 Ill. App., 177-179.

"If a party omits to inquire he is bound by all he would have learned where the circumstances put him on inquiry."

Hamlin v. Pettibone, 6 Bissell, 167, 172.
Yancy v. Cothran, 32 Fed., 687, 690.
Moore v. Sawyer, 167 Fed., 826, 843.

It is apparent from the foregoing authorities that it was bound to ascertain, at its peril, who or what the Schott Engineering Company represented, before it sold material to it, if it proposed to rely on the bond of plaintiff in error.

It is an undisputed fact in this case that the Illinois Surety Company had no knowledge of the creation of the Schott Engineering Company, as a corporation, and its becoming assignee of Schott until the bankruptcy proceedings in 1910.

In view of these stated facts that are undisputed, the following from the case of *Standard Oil Company v. Arnestad*, 6 N. Dakota, 255, is interesting, instructive and decisive of the claim of defendant in error:

"Finally, it is said that it does not appear that the plaintiff knew of the withdrawal of Eggerud from the firm, and that hence it follows that the old firm, as a firm, was still liable to the plaintiff for the funds misappropriated, no matter by whom they were embezzled. Upon this foundation plaintiffs builds up the argument that, inasmuch as the principals in the bond are liable, so are the sureties. But this reasoning entirely misapprehends the nature of the obligation of the sureties in this case. By signing the bond, they did not, in effect, assert to the plaintiff that they would be bound whenever the principals in the bond were liable in

any way to the plaintiff, whether because of their having embezzled the property, or by reason of the doctrine of estoppel, which would seal their lips against a denial of liability. They merely agreed to become responsible for the fidelity of the firm so long as each of the members of the firm should remain in the business. They contracted to be bound for the acts of Arnestad so long as they could have the protection resulting from the association of Eggerud with him in the same business. But they did not guarantee the integrity of Arnestad alone, unwatched and influenced by Eggerud, who may have been the only person in whom they reposed any trust. *If the plaintiff was ignorant of the change in the firm, so were the sureties; and if the sureties have a right to stand upon the terms of their contract, then it behooved the plaintiff to ascertain at its peril whether all the persons for whom the sureties had become responsible still remained at the helm of the business of the agency.* On this point, the decision of the court in *Birch v. De Rivera* (Sup.), 6 N. Y. Supp., 206, is decisive. The court there said: "The fact that the plaintiffs were not notified of the change is immaterial. They may have an action against the firm as it existed before the change because of the failure to notify them of the change, or to publish the notice of dissolution. That proceeds on another principle—presumption attached to continued firm dealings without notice. The guarantor is not responsible for a state of facts which might justify a recovery against the original members. There is no evidence that he was aware of the change. He seems to be as much without notice as the plaintiffs. *But were it otherwise, we may say, in the language of Lord Blackburn: "Nothing is stated to show that the defendant was under obligation to inform the plaintiff banking house of the fact or that he took steps to conceal it."* At all events, his contract is to guaranty a copartnership composed of certain persons, and that contract cannot be altered or extended without his consent." (Italics ours.)

In view of the foregoing, we respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial court in this case.

XIX.

MOLONEY ELECTRIC COMPANY CLAIM.

The Circuit Court of Appeals in its judgment against plaintiff in error, for the use of the several defendants in error, awarded the Moloney Electric Company a judgment of \$5,419.84, on a claim of that company aggregating \$6,611.01. (Tr. of Rec., 601.) For amount of judgment, see Transcript of Record, p. 591. The findings of fact regarding this case, by the trial judge are as follows:

"In regard to the claim of the Moloney Electric Company, I find that this company sold during the year 1909 certain electrical apparatus called 'transformers,' amounting to \$6,611 and for which the claim is made in this suit, to the Schott Engineering Company; that it was sold to the Schott Engineering Company on its credit, and that the charges therefor were made by said Moloney Electric Company on its books against the said Schott Engineering Company.

The apparatus furnished as aforesaid were used by the Schott Engineering Company, as assignee of Schott, in the work at the Naval Training Station, provided to be done by the said contract of July 30, 1908.

I further find that the said Moloney Electric Company rendered an invoice on October 6, 1909, to the Schott Engineering Company, in which it was expressly stated that said apparatus was sold to the said Schott Engineering Company; and that thereafter said Moloney Electric Company wrote to the said Schott Engineering Company for payment of said account involved in this suit." (Tr. of Rec., 532.)

The evidence upon which the court's findings of fact are predicated in this case are found on pages 370 to 379, inclusive, Transcript of Record.

This Honorable Court will bear in mind that the assignment of the contract from Schott to the Schott Engineering Company was on the 2nd day of January,

1909. The court finds as a fact that the Moloney Electric Company sold during the year 1909, certain electrical apparatus called "transformers," aggregating \$6,611 to the Schott Engineering Company; that it was sold to that company on credit and that the charges were made on the books of the Moloney Electric Company against the Schott Engineering Company; that the Moloney Electric Company rendered an invoice on October 6th, 1909, to the Schott Engineering Company, in which it was expressly stated that said apparatus was sold to the Schott Engineering Company; that thereafter, the Moloney Electric Company wrote to the Schott Engineering Company for payment of said amount involved in this suit.

Judge Sanborn, the trial judge, dismissed this claim against plaintiff in error and entered judgment for its costs, etc. The Circuit Court of Appeals for some reason that is not apparent on the record, reversed this judgment of the trial court and entered judgment against plaintiff in error for this company, in the sum of \$5,419.84.

There is nothing in the record that even indicates that the Moloney Electric Company ever had any dealings with W. H. Schott personally. This company knew when it made the contract with the Schott Engineering Company that that company was completing the building of the Naval Training Station at North Chicago. There is no novation or estoppel in this case. No argument can be made, justifying the judgment of the Circuit Court of Appeals in holding the plaintiff in error as surety to Schott for the claim of this company.

Without multiplying words or the citation of any authorities, we respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and affirm the judgment of Judge Sanborn.

X X.

UNIVERSAL PORTLAND CEMENT COMPANY
CLAIM.

The trial court in its findings of fact, relating to the above claim, held:

“With reference to the claim of the Universal Portland Cement Company, I find that during August, September and November, 1908, the said Universal Portland Cement Company sold to Schott a considerable quantity of cement on account, of which the sum of \$1,000 now remains unpaid. All of the cement was delivered to the Naval Training Station before the assignment. The greater part of this cement was used prior to the assignment by Schott on the work provided for by the contract, and the balance was used by the Schott Engineering Company after the assignment, as assignee of Schott, in the performance of the work provided for by said contract of July 30, 1908.

I further find that this company received the letter from the Central Trust Company, as receiver of the Schott Engineering Company, dated February 1, 1910, above referred to. But there is no evidence that it made any reply thereto.

I further find that on or about the 8th day of July, 1910, the said Universal Portland Cement Company filed with a referee in bankruptcy in the matter of the Schott Engineering Company, Bankrupt, a verified claim covering the amount sought to be recovered in this case, and for the same cement which is sought to be recovered here. The wording of this claim, so far as it is material, was as follows: ‘The consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special order and request, as shown by statements hereto attached and partly by promissory notes hereto attached. The Schott Engineering Company assumed and agreed to pay the liabilities of W. H. Schott for a valuable consideration.’ This company also filed a claim against the estate of Schott, the

wording of which, so far as it is material, was as follows: 'The consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special instance and request.' " (Tr. of Rec., 518-519.)

The evidence upon which the trial court made the findings of fact above quoted will be found on pages 246-264, inclusive transcript of record.

The trial court found in favor of defendant in error and entered a judgment against plaintiff in error in the sum of \$1,123.83. (Tr. of Rec., 550.)

The Circuit Court of Appeals reversed the judgment of the trial court and entered judgment in that court for the sum of \$819.82. (Tr. of Rec., 591.)

The findings of fact by the trial court show that this company was advised in January, 1910, at the direction of the Bankrupt Court in Chicago, that the Schott Engineering Company was at work on the contract, under which it had furnished material to W. H. Schott and that Schott had assigned the contract in question to the Schott Engineering Company.

It was also advised in the letter that all work done on the contract since January, 1909, had been done by the Schott Engineering Company and that payments had been made by the Government of over \$100,000 and that while the vouchers had been made payable to W. H. Schott, that they had been endorsed over by him to the Engineering Company, and that there was still due from the Government, \$26,000. It was advised also, that the Illinois Surety Company had disclaimed any liability for the Schott Engineering Company. It was shown in the letter that this defendant in error was advised, that prior to filing its claim in the Bankrupt Court, as hereinafter set forth, that the claims due on the contract,

after it was completed, would be about \$55,000, and with the \$26,000 due and \$40,000 more claimed for extras, as shown in the letter, would enable the receiver of the Schott Engineering Company to complete the contract, and if this allowance was made, there would be \$10,000 more than was necessary to pay 100 cents on the dollar, on all claims.

With this knowledge, defendant in error, on or about the 8th day of July, 1910, filed with the Referee in Bankruptcy, in the Schott Engineering Company, bankrupt, a verified claim, covering the amount sought to be recovered in this case, and for the same cement which is sought to be recovered here. The wording of this claim as found by the trial court, is as follows:

“The consideration of said debt is as follows: Merchandise sold and delivered to W. H. Schott at his special instance and request, as shown by statements hereto attached and partly by promissory notes hereto attached.

The Schott Engineering Company assumed and agreed to pay the liabilities of W. H. Schott for a valuable consideration.”

This Honorable Court will note that defendant in error specifically recognizes the terms and conditions of the assignment from Schott to the Schott Engineering Company on the 2nd day of January, 1909, and takes advantage of that assignment, by approving of the same and filing its claim against the Schott Engineering Company, bankrupt.

Now, the rule of law is that where the defendant in error elected to take the benefit of the assignment from Schott to the Schott Engineering Company, and filed its claim in the Bankrupt Court against that bankrupt, it ratified the assignment of Schott, accepted the new prin-

cipal and discharged plaintiff in error from any liability whatsoever.

"If, with a full knowledge of the facts concerning it they ratified it, *they thereby make themselves a party to it as much so as if the original agreement had been made with them.* And if they ratified it, no new or additional consideration was required to support the ratification; because in adopting the contract they accepted with it the original consideration on which it was founded as a sufficient consideration for their adoption of it." (Italics ours.)

Drakely v. Gregg, 8 Wall., 242, 267.

The ratification, with knowledge of the facts, such as was possessed by defendant in error, when it filed its claim in the Bankrupt Court, could not thereafter be withdrawn nor could it take a position inconsistent therewith.

"The assent of the creditor is conclusively manifested, however, by seeking to avail himself of the benefit of the deed, and we may add that the parties are conclusively fixed as assenting to the deed when a bill is filed to enforce their rights under it. See Tiff. & Bull., 293.

The party had his election to take the benefit under the deed, or to repudiate it and file his bill to set it aside as fraudulent, or as having been made to secure debts having no legal existence, and therefore without consideration. He has elected to become a party to the instrument; and the question is, whether he can claim under the instrument and at the same time repudiate it? The sound principle is thus stated in the case of *Thelluson v. Woodford*, cited in Story's Eq. Juris., Vol. 2, top p. 304, 'that a person shall not claim an interest under an instrument without giving full effect to that instrument as far as he can.' This doctrine is usually applied to the familiar case of election under wills, but is equally applicable to deeds. See *Birmingham v. Kirkman*, 2 Sch. & Lef., 449, 450.

The rule is thus stated by Mr. Story, Vol. 2, Eq.

Jur., s. 1077, in reference to wills: "That there is an implied condition that he who accepts a benefit under an instrument shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it.' "

Swanson & Gray v. John G. Tarkington et al.,
54 Tenn., 612, 614.

"But this is an action on the contract for the goods sold by the bankrupt. And although the assignees may either affirm or disaffirm the contract of the bankrupt, yet if they do affirm it, they must act consistently throughout. *They cannot*, as has often been observed in cases of this kind, *blow hot and cold*; and as the assignees in this case treated this transaction as a contract of sale, it must be pursued *through all its consequences*, one of which is that the party buying may set up the same defense to an action brought by the assignees, which he might have used against the bankrupt himself; and consequently may set off another debt which was owing from the bankrupt to him. This doctrine is fully recognized in *Hitchin v. Campbell*, and in *King v. Leith*. *Now here the assignees, by bringing this action on the contract, recognized the act of the bankrupt*, and must be bound by the transaction in the same manner as the bankrupt himself would have been; and if he had brought the action, the whole account must have been settled, and the defendant would have had a right to set off the amount of the bill. Therefore, on the distinction between the actions of trover and assumpsit, we are all of opinion that a judgment of nonsuit must be entered."

Smith v. Hodson, 4 Durnford & East., 211-217.

The Court of Appeals, New York, in the case below cited said:

"On May 20, three days after Wilmot's interview with the defendants and Patterson, the plaintiffs commenced a suit against Patterson, for this demand for goods sold and delivered. They obtained an attachment upon an affidavit of the plaintiff, Wil-

mot, in which he swears that Patterson is indebted to the plaintiffs in over ten thousand dollars for this flour, sold and delivered to him on May 12. There is not one word of qualification or explanation of that suit or of that affidavit.

Was not the sale and delivery, then *fully ratified by that suit*? I think it was. *Morris v. Rexford*, 18 N. Y., 552.

There was in the evidence touching this ratification *no disputed question of fact for the jury*. Had the jury found against the ratification—against the plaintiff's election to consider this a sale of the flour to Patterson, it would have been the clear duty of the court to set that verdict aside.

In such a case, as a general rule, the court may properly nonsuit the plaintiffs."

Wilmot v. Richardson, New York Court of Appeals Decisions, Vol. 4, Abbott's Decisions, 614-616.

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, *and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act.*"

Robb v. Vos, 155 U. S., 13, 43.

"It is a familiar maxim that ratification has a retroactive efficacy, and relates back to the inception of the transaction, and when deliberately made with a knowledge of the circumstances, as before stated, cannot be revoked or recalled."

Russ v. Telfener, 57 Fed., 973-974.

"The ratification related back to the original act. It could relate to no other act.

Judge Story, speaking of the rule of ratification, says: 'In short, the act is treated throughout as if it were originally authorized by the principal; for the ratification relates back to the time of the incep-

tion of the transaction, and has a complete retro-active efficacy." Story, Ag., 244. See, also *Soames v. Spencer*, 1 Dowl. & R., 32 (16 E. C. L., 14); *Moss v. Rossie Lead M. Co.*, 5 Hill., 137; *Lawrence v. Taylor*, Id., 107; *Hankins v. Baker*, 46 N. Y., 670."

In re Insurance Company, 22 Fed., 109-113.

"Another consideration, very important in cases of this sort is, that the principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. And hence the general rule is deduced, that, *where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent.* It may be added, that a ratification, once deliberately made, upon full knowledge of all the material circumstances, becomes *eo instanti*, obligatory, and cannot afterwards be revoked or recalled."

Sec. 250, Story on Agency, 9th Ed., p. 293. (All italic ours.)

Your Honors will note that in this case, the plaintiff in error occupies an entirely different position than its principal, Mr. Schott. Defendant in error, by its own act in the premises, as set forth in the findings of fact by the trial court, *released plaintiff in error as surety for Schott*, by recognizing the Schott Engineering Company as a new principal and making claim for its debt. This, however, does not release Schott. The rule of law on this is well stated by Brandt's Suretyship and Guaranty, Vol. 1, 3rd Ed., p. 353, Sec. 172:

"If the creditor release the surety he does not thereby discharge the principal. The reason why the discharge of one joint debtor discharges all is that the responsibility of the one not released is thereby increased. This reason does not apply to the case of the discharge of the surety, for the surety is not liable to the principal, but the principal is bound to indemnify the surety. The discharge of

the surety is nothing beyond what the principal himself was bound to effect, and therefore no injustice is done him."

We recognize the right of defendant in error to file its claim as it did, not only against the Schott Engineering Company, but against Schott, the bankrupt. Schott's assignment, so far as affects his rights, did not necessarily release him from the payment of the claim that he had incurred with defendant in error.

Plaintiff in error stands in a different relation from that of its principal and was released from any liability on its bond when defendant in error, with full knowledge of the assignment and the terms and conditions of the same, from Schott to the Schott Engineering Company, filed its claim in the Bankrupt Court against the Schott Engineering Company for the identical material that is sought to be recovered here.

Defendant in error, before it filed its claim in the Bankrupt Court against the Schott Engineering Company, knew that in the assignment from Schott to it, that Schott had conveyed to that company, every dollar of property and assets of every kind that he possessed. Defendant in error had the option to file its claim in the Bankrupt Court against the Schott Engineering Company or to refrain from so doing, and to file its claim alone, against Schott, the bankrupt, and hold plaintiff in error liable on its bond. It decided to accept and approve of the assignment of Schott to the Schott Engineering Company and to take advantage of that assignment, by filing its claim with the receiver of that company.

Under the authorities that we have cited in this brief and argument, this released plaintiff in error from any liability whatever in the premises.

We therefore, respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and enter a judgment in favor of plaintiff in error.

XXI.

RACINE STONE COMPANY CLAIM.

The findings of fact by the trial court in the above case are as follows:

"The court finds that in August, 1908, the Racine Stone Company, a corporation, and one of the use plaintiffs, entered into a written contract with W. H. Schott whereby said Stone Company agreed to sell and said Schott agreed to purchase all of the crushed limestone to be used by said Schott for the construction of conduit system under the said contract of said Schott with the Government, at a price agreed to be paid by said Schott to said Stone Company; that pursuant to said contract said Stone Company did furnish such crushed stone to said Schott in 1908 and in 1909, and the price thereof was duly paid and settled from time to time, except that the sum of \$113.28 for stone furnished in November and December, 1909, was not paid. The material was used in the prosecution of the work under the Schott contract with the Government. No evidence appears in the case to the effect that said Stone Company had actual knowledge of the assignment by said Schott of his contract with the Government to the Schott Engineering Company. For the stone furnished under its said contract with Schott the Stone Company opened up account and charged the same to W. H. Schott upon its books of account, and the charges continued to be entered on said books against the said Schott for the stone furnished after January 1, 1909. The Stone Company received the receiver's letter, but made no reply. It also filed the claim here in question against the Engineering Company in the bankruptcy proceedings." (Tr. of Rec., 526-27.)

The trial court entered judgment against plaintiff in error for the amount of the claim, \$127.28. (Tr. of Rec., 550.)

This judgment was reversed by the Circuit Court of Appeals and judgment entered for \$92.87. (Tr. of Rec., 591.)

The evidence upon which the trial court made its findings of fact will be found on pages 290 to 296, inclusive, Transcript of Record.

While the trial court finds that there was no evidence showing that defendant in error had knowledge of the assignment from Schott to the Schott Engineering Company, while it was furnishing materials for which it seeks to recover against the plaintiff in error here, yet the court does find that the letter that was directed to be sent to the creditors that furnished material that was used in the construction of the building in question by the bankrupt court in Chicago, was sent to this defendant in error. That letter is set out in full in the findings of fact, and will be found on pages 510 to 513, inclusive, Transcript of Record. It clearly advises defendant in error of the assignment and of the then present condition of the contract, so far as respects the completion of the building is concerned, and also the amount of the claims that were unpaid, etc., and the amount that was expected to be recovered from the Government, and also the extras that were claimed, aggregating in the sum of \$40,000.

Now, under all of these facts that were before defendant in error, it filed its claim in the bankrupt court against the Schott Engineering Company and claimed that that company owed it the amount for which this suit is brought, viz.: \$113.28. It could not make that claim unless it recognized the assignment from Schott to the Schott Engineering Company and approved the same. The Schott Engineering Company could not possibly be indebted to it in any sum whatever, unless, as

we have said, it not only recognized that a new principal had been brought into the case, so far as plaintiff in error is concerned, but that it would accept of that new principal and recover from it. It had the option, so far as plaintiff in error is concerned, after it received the letter above referred to, to stand on its legal rights and insist that plaintiff in error should be responsible for its claim, or it could accept the new conditions, brought about by the assignment from Schott to the Schott Engineering Company, and accept the new principal by filing its claim and insist that that new principal was indebted to it on this claim.

Now having acquiesced in and ratified the assignment, it is in no position to demand anything from plaintiff in error.

“We are still unable to see how a party may accept the benefits of a contract, and at the same time refuse to be bound by its terms and conditions. The rule is that under a contract made for the benefit of a third party, *in case such third party avails itself of its advantages*, the law creates a privity, and he must bear the burdens that properly belong to him as a party to the contract. (Citing cases.) A contract cannot be affirmed in part and rejected in part. It must be totally repudiated, or not repudiated at all.” (Italics ours.)

Meridian Life & T. Co. v. Eaton, 41 Ind. App., 118; 82 N. E., 480.

We also desire to refer to the authorities that we have cited in the case of the Universal Portland Cement Company.

The Racine Stone Company, with the knowledge of facts such as it possessed, when it filed its petition with the receiver of the Schott Engineering Company, bankrupt, thereby ratified the assignment from Schott to the Schott Engineering Company and accepted the new prin-

cial, for the payment of its claim, so far as plaintiff in error is concerned. It cannot now, as against plaintiff in error, take a position inconsistent therewith.

"It is a familiar maxim that ratification has a retroactive efficacy, and relates back to the inception of the transaction, and, when deliberately made with a knowledge of the circumstances, as before stated, cannot be revoked or recalled."

Russ v. Telfener, 57 Fed., 973-4.

"The ratification related back to the original act. It could relate to no other act.

Judge Story, speaking of the rule of ratification, says: 'In short, the act is treated throughout as if it were originally authorized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy.' Story, Ag., 244. See, also, *Soames v. Spencer*, 1 Dowl. & R., 32 (16 E. C. L., 14); *Moss v. Rossie Lead M. Co.*, 5 Hill, 137; *Lawrence v. Taylor*, Id., 107; *Hankins v. Baker*, 46 N. Y., 670."

In re Insurance Company, 22 Fed., 109, 113.

"Another consideration, very important in cases of this sort, is, that the principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none. And hence the general rule is deduced, that, *where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent*. It may be added, that a ratification, once deliberately made, upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot afterwards be revoked or recalled."

Story on Agency, 9th Ed., Sec. 250, p. 293.

(Italics ours.)

We, therefore, respectfully ask your Honors to reverse the judgment in the Circuit Court of Appeals and to enter a judgment on this claim in favor of plaintiff in error.

XXII.

NANCY W. WATROUS, DOING BUSINESS AS G. B.
WATROUS SONS, CLAIM.

The findings of fact by the trial court in the above claim are as follows:

“Nancy W. Watrous, doing business as G. B. Watrous Sons, one of the use plaintiffs, sold and delivered to the Schott Engineering Company, for the use under the Schott contract with the Government, in September, 1909, and thereafter, until January 11th, 1910, certain materials amounting to \$379.85, which was overdue at the time this suit was brought, and no part of the same has been paid. The said materials were used in the prosecution of the work under said contract with the Government.”
(Tr. of Rec., 529.)

The evidence upon which the trial court made the foregoing findings of fact will be found on pages 381-408 inclusive, Transcript of Record.

The trial court found against claimant and entered a judgment in favor of plaintiff in error. (Tr. of Rec., 550.)

The Circuit Court of Appeals has reversed the judgment of the trial court and entered judgment against plaintiff in error in favor of the above named claimant for \$311.41. (Tr. of Rec., 591.)

We respectfully ask this Honorable Court to reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the trial court on this claim.

XXIII.

Counsel for the John Davis Company and other of the defendants in error, in their argument before the Circuit Court of Appeals held that the proper construction of the statute in question made plaintiff in error liable as the bondsman of Schott, the original principal in the contract, for all materials that went into the construction of the building, used in the completion of the contract, regardless of whether the same were furnished to Schott or a sub-contractor or an assignee of Schott, and cited a large number of authorities, which they claimed supported their contention, among them the cases of *Hill v. Surety Company*, 200 U. S. Rep., 197, and *Hardaway v. National Surety Company*, 211 U. S. Rep., 552.

Inasmuch as the Circuit Court of Appeals has fallen into the error that is involved in their argument, and held that plaintiff in error is liable for material furnished to the Schott Engineering Company, an assignee of Schott, they will undoubtedly present this contention here with renewed vigor.

We have since the decision of the Circuit Court of Appeals in this case, examined all of the authorities cited by them and all of the cases that have been decided by this court, under the statute in question, and we say, unqualifiedly, that this court has never decided that a surety can be held on a bond given on a contract, under the statute in question, unless the material was furnished to the contractor himself, or to his sub-contractor, which is simply another self.

There is no case in the books that we have been able to find, after a careful research, that holds as does the Circuit Court of Appeals in this case, that one who furnished material to an assignee of the original contractor,

with knowledge of the assignment, can still hold the surety of the original contractor for material so furnished.

During the course of the argument by counsel for defendants in error in the Circuit Court of Appeals, much stress was placed upon the Hill and Hardaway cases, *supra*, as holding that if the material went into the completion of the contract, the surety company that bonded the original contractor could be held liable for such material, regardless of the question as to whether it was furnished to a sub-contractor or an assignee of the original contractor.

Those cases as we read them, do not support this contention. On the contrary, they specifically hold that the surety company is not liable unless the material is furnished to the contractor or his sub-contractor.

In the Hardaway case, this court held that although Hardaway and Prowell had expended between \$30,000 and \$40,000 for material that went into the completion of the contract in that case, that they could not recover from the surety company, because they did not stand in the position of a sub-contractor to the original contractor and the material was not furnished to the contractor or sub-contractor.

We have already shown that a sub-contractor is one of the units by which the original contractor completes his contract, and hence material furnished to him is precisely the same in effect, as though furnished to the contractor himself.

Material furnished to an assignee is furnished to a person who has no contractual relations whatever with the original contractor. Just the reverse conditions exist to that of a sub-contractor, and if a materialman furnishes material to an assignee, he does it with his eyes

open, and assumes whatever risk there is in furnishing to such a party material called for on an order.

As was held by this court in the case of *Illinois Surety Co. v. Peeler*, 240 U. S. Rep., on page 224, the statute provides for an additional obligation that the contractor shall make payments to all persons supplying *him* with labor and materials in the prosecution of the work provided for in such contract.

“The statute provides that the bond shall have ‘the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.’ In this respect, the provision is substantially the same as that contained in the Act of 1894, and the obligation in favor of the material men and laborers has been held to be a distinct obligation. *Guaranty Co. v. Pressed Brick Co.*, 191 U. S., 416, 423, 425; *Hill v. Am. Surety Co.*, 200 U. S., 197, 201, 202. It is an obligation for the payment of money to the persons described, which they are entitled to enforce.”

Illinois Surety Co. v. Peeler, 240 U. S. Rep., p. 224.

Now, as this court holds in the above quotation, the obligation for the payment of money to materialmen is one which *the materialmen are entitled to enforce*. One of the errors in the decision of the Circuit Court of Appeals is that that court makes no account of what may be done by the materialman to lose his right to enforce his claim under the statute. It is elemental that a right thus given by statute, can be lost by the conduct of one in whose favor the statute was passed.

Now so far as affects all of the defendants in error in this case, they have taken such action individually and personally, regarding the assignment of the contract from Schott to the Schott Engineering Company that they are

not in a position to enforce the rights which the statute otherwise has given them.

All of the defendants in error dealt directly with the Schott Engineering Company, as we have heretofore shown. The orders received by them were orders from the Schott Engineering Company. They honored the orders from the Schott Engineering Company, thus holding a direct contractual relation with that Company. We have shown by the authorities heretofore quoted in this brief and argument, that such conduct upon their part releases plaintiff in error from any liability whatever.

It appears from the findings of fact by the trial court that Schott, after the 2nd day of January, 1909, dropped out of the consideration of the completion of the contract personally, as effectually as he would have done had he died on that date. Now suppose, as a matter of fact, that Schott had died on the 2nd day of January, 1909, and a corporation, known as the Schott Engineering Company, had taken up his work and completed the contract, and all of these defendants in error had furnished it material, would anybody, under such a state of facts, maintain that the Illinois Surety Company was liable to these materialmen? Certainly not.

These defendants in error have no greater claim on plaintiff in error for material furnished to the Schott Engineering Company, that went into the completion of the building in question than they would have had, had Schott died on the date named, and they had gone on and furnished the Schott Engineering Company material with which it could complete the contract.

XXIV.

The Circuit Court of Appeals, in its judgment, allowed interest to each of the defendants in error, on the judgment awarded, at the rate of 5 per cent., from August 16th, 1911. In its opinion, in support of this judgment it said:

"The principal of the bond, however, is not the measure of liability thereon. Failure of the surety to discharge its obligation thereunder, after proper demand or commencement of a suit, subjects it to the payment of interest. Under Ill. Rev. Stat. Chap. 74, Sec. 2, as construed in *Holmes v. Standard Oil Co.*, 183 Ill., p. 70, this is at the rate of 5 per cent. per annum, from the commencement of the suit."

We think that the learned court misinterpreted the opinion of the Supreme Court of Illinois, in the case of *Holmes v. Standard Oil Company*, 183 Ill., 70. In that decision, the court does not hold that the interest shall date from the commencement of the suit. The holding of that court is as follows:

"Sec. 2 of Chap. 74, entitled 'Interest,' Hurd's Stat. 1897 (973), provides that creditors shall be allowed to receive interest at the rate of five per centum per annum for all moneys, after they become due on any bond, etc."

This quotation is taken from page 74.

This does not hold, as your Honors will see, that interest is to date from the commencement of the suit. A claim does not become due on a bond until the specific sum that the materialman is entitled to recover is determined.

"Appellee insists that the Appellate Court erred in not allowing interest on the amount found due him from August 1st, 1891, to the time of the verdict, but we think there was no error in this respect. The damages due appellee for the breach of the contract were not so certain or definite that appellant could,

without the verdict of the jury, know how much he was liable for, and the case does not come within the provisions of the statute for the allowance of damages."

Dady v. Condit, 209 Ill., p. 488.

The above quotation is taken from page 503.

In the case at bar, if there were a liability by plaintiff in error to any one of the defendants in error, it could not have made payment of the same for two reasons:

First. The amount that the claimant was to receive was not certain and definite until it was actually decided by the Circuit Court of Appeals.

Second. The claims of the various defendants exceeded the amount of the bond, and on the assumption that plaintiff in error was liable for each one of the defendants, it could not be determined how much was to be paid each, until the final determination in the Circuit Court of Appeals.

Your Honors will note that the claims of nine defendants in error in the Circuit Court of Appeals were dismissed by that court and the nineteen, in whose favor judgment was rendered, had claims that aggregated \$7,000 or \$8,000 over and above the amount of the bond. (Tr. of Rec., 591-592.)

Under these conditions there could be no certain or definite amount that plaintiff in error, if it were liable on its bond, could pay to any one of the defendants in error, until it was determined by the court.

Under these circumstances, it seems to us that the Circuit Court of Appeals erred in allowing interest from the 16th day of August, 1911, the date of the commencement of the suit.

Our contention is confirmed by the recent decision of

the Circuit Court of Appeals, for the 4th Circuit, in the case of *Illinois Surety Co. v. Peeler*, 215 Fed., 334. Interest was claimed by the various materialmen in that case, but that court, in disposing of the question, stated on page 340:

“We are also of opinion that the learned district judge was right in allowing interest only from the date of the order awarding judgment, because the amounts due the respective sub-contractors were not ascertained and determined until the trial of the action.”

This case was affirmed by your Honors in the 240 U. S. Rep., 214.

In referring to the question of interest, we do not feel your Honors will ever reach that, in the consideration of this case. If the interest were a vital question in the case, we could produce any number of authorities to show that the rule announced in the *Peeler* case, 215 Fed., *supra*, is the rule that should be adopted.

Every surety company, doing business in the United States is vitally interested in having this court maintain the well established rules, regarding assignments and the rights of surety companies thereunder.

From every point of view from which the rights of plaintiff in error can be considered, but one conclusion, as it seems to us, can be reached: that is, that it cannot be held liable for any of the claims of defendants in error.

We, therefore, respectfully ask your Honors to reverse the judgment of the Circuit Court of Appeals and enter a judgment against all of defendants in error, and in favor of plaintiff in error.

Respectfully submitted,

ALBERT J. HOPKINS,
Attorney for Plaintiff in Error.